(18,546.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 58.

THE CITY OF OWENSBORO, APPELLANT,

vs.

THE OWENSBORO WATER WORKS COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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1 *Transcript of Record.*

U. S. Circuit Court of Appeals, Sixth Circuit, *sct.*

CITY OF OWENSBORO, Appellant,
vs.
OWENSBORO WATER WORKS CO., Appellee.

The clerk will please have printed in above styled case all of the transcript, except a "pocket map of the city of Owensboro," filed as an exhibit with the deposition of Asa Williams on page 211 of the transcript.

Aug. 15, 1901.

GEO. W. JOLLY,
Att'y for City of Owensboro, Ky.

1007. Appellant's parts of the record to be printed. Filed Aug. 15, 1901. Frank O. Loveland, clerk.

United States Circuit Court of Appeals, Sixth Circuit.

CITY OF OWENSBORO, Appellant,
vs.
OWENSBORO WATER WORKS COMPANY, Appellee.

Notice.

The clerk of this court will cause to be printed as a part of the record herein for the consideration of the court on the hearing of this appeal the pocket map filed by the witness Asa Williams and made part of his deposition. This in addition to the record heretofore ordered to be printed by the appellant.

September 26th, 1901.

OWENSBORO WATER WORKS COMPANY,
By SWEENEY, ELLIS & SWEENEY,
Attorneys for Appellee.

2 Mr. George W. Jolly:

Attorney for appellant, City of Owensboro, will take note that we have this day made the above request and direction to the clerk for the United States circuit court of appeals, sixth circuit, in the above entitled action.

September 26th, 1901.

OWENSBORO WATER WORKS COMPANY,
By SWEENEY, ELLIS & SWEENEY,
Attorneys for Appellee.

Service accepted of this notice.
Sept. 26th, 1901.

THE CITY OF OWENSBORO,
By GEO. W. JOLLY, *City Attorney.*

No. 1007. Statement of appellee's portion of record to be printed. Filed Sep. 27, 1901. Frank O. Loveland, cl'k.

OWENSBORO, KY., *Aug.* 10, 1901.

Frank O. Loveland, Esq., clerk of U. S. circuit court of appeals, Cincinnati, Ohio.

DEAR SIR: All orders and decrees made in the enclosed case of The Owensboro Water Works Company *v.* The City of Owensboro, Kentucky, appealed from the U. S. circuit court at Owensboro, Kentucky, were made by his honor the Hon. Walter Evans judge of the district court of the United States for the western district of Kentucky; except a motion was made before Hon. Horace H. Lurton to dissolve the temporary injunction granted in this case and said motion was overruled by him.

This information is given you in compliance with your request in your letter of the 11th February, addressed to E. M. Bell, clerk, &c., Owensboro, Ky.

Yours very truly, DUDLEY LINDSEY,
Deputy Clerk U. S. Courts.

3 Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO, &c., Defendants.

Transcript of Record.

Pleas before the Honorable Walter Evans, judge of the district court of the United States for the district of Kentucky, sitting as circuit judge, at a regular term of the circuit court of the United States, sixth circuit and district of Kentucky, Owensboro division, begun and held on the third day of June, 1901, at Owensboro, Kentucky.

Be it remembered that heretofore, to wit: on the 30th day of March, A. D. 1900, there was filed in the clerk's office of said circuit court of the United States at Owensboro, Kentucky, a bill in equity and three exhibits which were of the following words and figures, to wit:

Circuit Court of the United States, District of Kentucky (Owensboro Division).

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO and LAWSON RENO, Judge of the Police Court of the City of Owensboro, Defendant-.

Bill in Equity,

To the honorable the judges of the circuit court of the United States in and for the district of Kentucky:

May it please your honors:

I.

4 The complainant, The Owensboro Water Works Company, of Owensboro, Kentucky, says it is a domestic corporation created, organized and is doing business under the general laws of the State of Kentucky: its articles of incorporation were duly signed, acknowledged and recorded in the Daviess county court clerk's office, which is the county in which complainant's place of business is situated.

It was incorporated and organized on the 3rd day of June, 1889, by the terms of its articles of incorporation, its corporate life was fixed at a period of twenty-five years from the date of its creation.

Among other powers conferred on complainant by its articles of incorporation, is the right to acquire by purchase or otherwise and to maintain and operate a system of water works in the city of Owensboro, Daviess county, Kentucky, and to supply defendant city and the inhabitants thereof with water for public and private use, for the period of twenty-five years, from the date of its incorporation, and to supply defendant city with water for fire protection at all times, unavoidable accidents excepted.

Complainant company, in virtue of its articles of incorporation, among other powers, has the power to contract and be contracted with, to sue and be sued in its corporate name, The Owensboro Water Works Company of Owensboro, Kentucky.

The defendant, The City of Owensboro, is a municipal corporation, created under the laws of Kentucky.

It was originally chartered and created a city by an act of the General Assembly of the Commonwealth of Kentucky, "entitled an act to incorporate the city of Owensboro, in Daviess county," which act was approved February 16th, 1866.

Afterwards, on the 18th day of March, 1882, defendant city procured the passage of an act, "entitled an act to create a new charter for the city of Owensboro," which act it accepted, and under the

two acts above mentioned, defendant City of Owensboro continued to exist as a municipal corporation, from the 16th day of February, 1866, until the 14th day of June, 1893, when it was again continued as a city of the third class under the general laws of the State granting charters to cities of the third class.

The act of the General Assembly of the Commonwealth of Kentucky, continuing defendant city as a city of the third class, expressly stipulated among other things:

"That the repeal of any law by the provisions of this law (the charter) shall not in any wise be so construed as to effect any right or liability acquired, or assumed thereunder by or on the part of the city, or any persons or body corporate.

"This law shall not in any manner effect any right, lien, or liability accrued, established or subsisting under and by virtue of previous charters, or amendments thereto, or ordinances passed thereunder. But such rights, lien or liability shall be enforced, and such action or proceedings shall be carried on in all respects as if this law (defendant city's present charter) had not taken effect; nor shall this law be in any wise so construed as to effect the right or liability acquired or assumed under previous charters, or amendments thereto, or ordinances passed thereunder on the part of the city or any person or body corporate."

(Section 220, charters of cities of the third class.)

The defendant, City of Owensboro, under each and all of the charters above mentioned, including that granted it by the act of the General Assembly, approved February 16th, 1866, among other things, was granted perpetual succession, and was and is a body politic, and corporate, and had, among other rights, the right to contract and be contracted with, to sue and be sued in its corporate name; it has and had the right, authority and power under each and all its various charters, "to provide by ordinance for the furnishing of the city of Owensboro and the inhabitants thereof, with gas and water."

Complainant says defendant city on each and all the dates hereinafter mentioned possessed the power aforesaid, and in the rightful exercise of such powers passed an ordinance, made, executed and delivered the contracts hereinafter set out.

II.

Your orator further complains and says that sometime prior to its creation and organization, to wit: on the — day of ——, 1878, there was created and duly organized under the laws of the State of Kentucky, a corporation known as the "Owensboro Water Company," its chief business was to build, construct and operate a water works plant in the city of Owensboro, for the purpose of supplying defendant city and its inhabitants with water.

This Owensboro Water Company did build, construct and put into operation in the city of Owensboro a system of water works, which

it was operating at and on the date of the incorporation of plaintiff company.

On the — day of June, 1889, the complainant, The Owensboro Water Works Company, of Owensboro, Kentucky, began
6 negotiations with the Owensboro Water Company for the purchase of its franchises, its entire system of water works, and all the contracts it had with the defendant, The City of Owensboro, including its entire system. its pumping plant, pipe system and all the franchises then owned by said company; complainant also for a valuable consideration proposed to purchase of said Owensboro Water Company all contracts which it then had with the city of Owensboro, which contracts will be more specifically stated hereafter.

But complainant did not and would not consum-ate said contract until defendant city agreed to grant it a franchise and license to maintain a system of water works in the city of Owensboro, for a term of twenty-five years, from that date, for purpose of supplying defendant city and its inhabitants with water, and to transfer, assign and grant to it in its own right, all the rights and privileges which it had heretofore granted to the Owensboro Water Company by ordinance and contracts passed on the 10th day of September, 1878.

The rights, privileges and franchises granted under the said ordinance will more fully appear from a copy of the said ordinance, which is filed herewith and made a part hereof all of which ordinance the complainant pleads and relies on herein, but it particularly points to section- 9 and 10.

Section 9 is in the following words:

"The said company shall have the power and authority to make and enforce as part of the condition upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law, or the provisions of this ordinance."

Section 10. "The city will adopt and enforce all ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition and against injury to the hydrants rented by it to said city and against waste of water by consumers."

It states that it was provided, among other things in said ordinance, that the said Owensboro Water Company should, within a time specified, accept the terms of the said ordinance above referred to and that when it did so that the said ordinance was to "be the measure of the rights and liabilities of the said city and of the water company."

On the third day of June, 1889, the defendant city approved the proposed purchase of complainant company and the transfer to it by
the Owensboro Water Company of the then existing contracts
7 which said Owensboro Water Company had with the defendant city and expressed a willingness to grant to the complainant a license and franchise for a period of twenty-five years from that date, and to grant to the complainant all the rights and

privileges which it had theretofore granted to the Owensboro Water Company.

Thereupon defendant city to carry out its said agreement passed an ordinance, in which it recited among other things, the contract of defendant city to grant to complainant all the rights, privileges and franchises theretofore granted to the Owensboro Water Company, and to transfer and assign to it all said rights and privileges theretofore granted to said corporation.

The said ordinance further recited that complainant company was ready to purchase the water works of the Owensboro Water Company with its franchises and privileges and its then existing contracts with defendant city for supplying it and its inhabitants with water.

It was further provided in said ordinance in order that the complainant might perfect its contract with the said Owensboro Water Company, and as an inducement to complainant to do so, the city of Owensboro then and there granted to it a franchise and license to maintain, complete, extend and operate a water works system in the city of Owensboro, and to use the streets, alleys and public highways within the limits of the city for the purpose of laying, repairing, taking up its mains, service pipes, hydrants and other apparatus, and for supplying defendant city and its inhabitants with water; and defendant city did then by the said ordinance (a copy of which will be filed herewith as a part hereof) covenant*ed* to and with the complainant and as an inducement to it to purchase the plant of the Owensboro Water Company that it would and did then accept complainant as the successor and in the place of said Owensboro Water Company, in the contracts theretofore made by said water works company, with defendant city for the rental of hydrants and for other purposes, and that it would and it did, then by official corporate action, confer on complainant all the franchises it had theretofore conferred on the Owensboro Water Company; among which was the right to establish rules, fix rates and regulate the mode and manner in which the private consumers of its water should pay their water rents.

In order to enable the complainant company and the Owensboro Water Company to perfect, complete and carry out the sale and negotiations to complainant as heretofore set out, and in order
8 to transfer the contracts which the Owensboro Water Company then had with the defendant city, for the rent of hydrants, and for other purposes, as specified in the contract which defendant city had with the Owensboro Water Company and to vest all the rights which the said water company had under the said contract and ordinance aforesaid in complainant, defendant city enacted and passed the following ordinance, to wit:

"Be it ordained by the common council of the city of Owensboro:

"SEC. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water

works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the city of Owensboro, for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the city of Owensboro the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water.

"But there shall be no continued unreasonable obstruction of said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company, as near as practicable, to their former condition; and the said grant is subject to the existing right of purchase of the said water works by the said city of Owensboro.

"SEC. 2. That, in like consideration of said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the city of Owensboro hereby accepts the said Owensboro Water Works Company, of Owensboro, Kentucky, as the successor to the contracts for hydrant rentals now existing between the city of Owensboro and the Owensboro Water Company, as fully as if such existing contracts had been originally made by the city of Owensboro with the said Owensboro Water Works Company, of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

"SEC. 3. That the consent of the city of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water
9 Works Company, of Owensboro, Kentucky, and upon such consummation the mayor and city clerk of the city of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the city of Owensboro, and to sign such copies as the contract between the city of Owensboro and the Owensboro Water Works Company, of Owensboro, Kentucky, and to accept the other in behalf of the city of Owensboro, when signed and sealed by the said The Owensboro Water Works Company, of Owensboro, Kentucky.

"SEC. 4. This ordinance shall take effect at its passage and publication.

"JOE LEE, *Mayor.*

"PHIL. R. ZULAUF, *Clerk.*"

The ordinance and contract aforesaid was signed under seal, by complainant, and delivered to the defendant city, who now has the same in its possession.

As stipulated in the foregoing ordinance, the defendant City of Owensboro acting by its duly elected and qualified mayor and city clerk, signed, acknowledged and delivered to the complainant copies

of the contract between the defendant city and complainant, The Owensboro Water Works Company, of Owensboro, Kentucky, and the city accepted said complainant as the successor to the contracts for hydrant rentals, then existing between the defendant city and the Owensboro Water Company, as fully as if said contracts had been originally made by defendant city with complainant without the intervention of the said Owensboro Water Company.

Your orator further shows since said time the contractual relations arising between complainant and defendant city from said ordinance have been and are in full force between complainant and defendant city.

III.

Your orator further shows that in virtue of the contracts and ordinance aforesaid, and relying upon the rights and privileges therein granted, and its contract with defendant city, complainant on the 10th day of June, 1889, purchased from the Owensboro Water Company by deed duly signed, acknowledged and delivered to it the entire water works system of the Owensboro Water Company, together with all its contracts, rights, privileges, license and franchises, then existing between said corporation and defendant city.

Since the date of said purchase complainant, acting under the authority, ordinance and contract between it and defendant city, it has from time to time, as it had the legal right to do, and the right under its contract to do, fixed water rates to be paid by private consumers.

It has fixed and maintained reasonable conditions, regulations and rules upon which it would supply water to the inhabitants of said city, who desired to use same, water, and under these rules, regulations and conditions it has been and is now furnishing all the inhabitants of defendant city, who desire it, water.

Among other regulations established by complainant company, relating to private consumers, to whom it supplies water, it has by appropriate and proper and necessary rules, provided for the payment of water rents by private consumers every six months in advance, which rule is reasonable and just, as your orator will hereinafter show.

The rates and regulations so fixed by complainant were and are reasonable and they were made and have been maintained in virtue of the contracts, ordinances and agreements made between it and the defendant city set out and in virtue of the power and authority which complainant company possesses under its corporate existence and under its contracts and agreements with defendant city.

Such rules and regulations as complainant has established and maintained, it had the right in virtue of its contracts with defendant city, and in virtue of the general law to make.

On the 10th day of June, 1889, the complainant purchased as aforesaid from the Owensboro Water Company its water works, in the city of Owensboro, and all its contracts, including its contracts with defendant city to supply it water, and it has ever since then,

under the orders and directions of defendant city, maintained the said system and extended its system of water mains on account of which it has been compelled to and has expended large sums of money, until the water works plant, which it is now operating in the city of Owensboro, has cost it and the said plant is now reasonably worth, estimated at a fair cash value not less than $250,000.00, and it was worth this sum on each and all the dates hereinafter mentioned.

Its system of water works in the city of Owensboro, and its water works plant, to-day, could not be constructed for less than the sum aforesaid.

11 IV.

On Monday, March 12th, 1900, defendant, City of Owensboro, acting through its mayor and common council, introduced and caused to be read and passed by said council, the alleged ordinance (2949 No.) herein complained of, which is in words and figures as follows:

"Be it ordained by the common council of the city of Owensboro:

SEC. 1. That hereafter every person, firm, company and corporation, engaged in the business of furnishing water to consumers thereof in the city of Owensboro, shall furnish the same to consumers thereof for domestic and manufacturing purposes and uses, and for all other purposes and uses, at rates and prices not exceeding the rates and prices herein named and fixed, which rates and prices are deemed reasonable and just; that is to say, water shall be furnished to all mills, laundries, saloons, distilleries, breweries, livery stables, ice factories and manufacturing establishments, hotels, street railway companies, and all factories of every kind at the following named rates, subject to the exceptions contained in section two (2) of this ordinance, to-wit:

(1.) In all cases where the amount of water consumed averages two thousand gallons per day, or less, estimated by the month, ten cents per thousand gallons; (2) where the daily consumption of water averages two thousand gallons or more and less than four thousand gallons, estimated by the month, nine cents per thousand gallons; (3) where the daily consumption of water averages four thousand gallons or more, and less than ten thousand gallons, estimated by the month, eight cents per thousand gallons; (4) where the daily consumption of water averages ten thousand gallons or more, and less than fifteen thousand gallons, estimated by the month, seven cents per thousand gallons; (5) where the daily consumption of water averages fifteen thousand gallons or more, and less than twenty thousand gallons, estimated by the month, five cents per thousand gallons; (6) where the daily consumption of water averages twenty-five thousand gallons or more, and less than forty thousand gallons, estimated by the month, four cents per thousand gallons; (7) where the daily consumption of water averages

forty thousand gallons of water or more, estimated by the month, 3½ cents per thousand gallons.

That for the purpose of ascertaining and estimating accurately the quantity of water consumed by consumers, described in the classification of this section and the compensation to be paid
12 therefor, it is hereby made the duty of the person, firm, companies or corporations, and they shall on request made in writing and within 30 days after such request is made, place a water meter in good condition and repair, in connection with the pipe or main leading into and supplying water to such consumers, and the said meter shall be kept in good repair by the person, firm, company and corporation furnishing and supplying the water to such consumer, and the said meter shall be examined and read at least monthly, for the purpose of ascertaining its condition and the quantity of water consumed.

Provided, that the minimum annual rate to be paid by all consumers of water described in the classification thereof in this section, per annum, shall be twenty-four (24) dollars, and in no case shall the consumer of water who uses or consumes annually, two hundred and forty thousand gallons of water, or less, be charged or pay more or less than twenty-four (24) dollars per annum.

SEC. 2. That water furnished by said persons, firm, company and corporation to consumers thereof for domestic purposes and uses where no meter has been put in or attached for ascertaining the quantity of water used, shall be furnished rates and charges not exceeding or above the following named rates and charges per year, to wit:

(1.) For each wash-stand, wherein warm and cold water, or either is used, two dollars; (2) for each kitchen sink, wherein warm and cold water, or either is used, two dollars; (3) for each bath tub, wherein warm and cold water, or either is used, two dollars; (4) for each water closet and urinal, two dollars; (5) for sprinkling premises, lawn, pavement and street in front of or adjacent to the premises, per annum, two dollars and fifty cents, for the first two hundred square yards or less, and one cent for each additional square yard; (6) for private dwellings, per annum, where only one tap or faucet is used, containing four rooms or less, excluding hallways, garrets, bath rooms and water closets, two dollars, and for each additional room fifty cents; (7) for each cow, one dollar; for each horse, one dollar, and for each carriage, buggy and spring wagon, one dollar; (8) for filling cisterns, twenty cents for each thousand gallons.

SUB-SEC. 2. And for furnishing water for offices, banks, stores and other places and residences (above specified in this section), the rates and charges therefor shall be at rates not exceeding or above the following named rates and charges, per year, to-wit:

For each wash-stand, wherein warm and cold water, or
13 either *are* used, three dollars; (2) for each water closet and urinal, three dollars; (3) for each hydrant, three dollars; (4) for barber shops, for first chair, three dollars; for each additional chair one dollar; (5) for blacksmiths, for first forge, two dollars,

and for each additional forge, one dollar; (6) for plasterers, one-fourth of one per cent. per square yard;(7) for brick layers, six cents per one thousand brick, sprinkling and laying.

Provided, That any of the consumers embraced in the classification of this section may, in lieu of the above rates, require the person, firm, company or corporation furnishing the water consumed, to attach to the pipe leading into the premises of the consumer a water meter, and it shall be the duty of the person, firm, company or corporation furnishing the water to attach the said meter within thirty days after said request is made therefor in writing, and thereafter the said consumer shall be charged and shall pay for the water furnished at the minimum rate of twelve dollars per annum, and for all water consumed in excess of one hundred and twenty thousand gallons per annum, there shall be paid ten cents for each thousand gallons; but such meters shall not be attached except by the written request of the consumer.

And provided, further, That before meters are attached to or connected with the pipes or mains leading into the premises of any consumer described in the classification in this section, by the person, firm, company or corporation supplying the water, consent of such consumers shall be first obtained, and if objection shall be made by the consumer, the mayor of the city, upon complaint of the person, firm, company or corporation furnishing the water, shall summon the consumer to appear before him, and shall hear and determine the matter and decide whether the meter shall be attached, and his decision shall be final.

If said persons, firms, companies or corporations, furnishing water shall attach a meter in any case to the pipe without his consent or against his objection, and the water annually consumed shall not be as much as one hundred and twenty thousand gallons, the consumer shall pay for the water actually consumed at the rate of ten cents per thousand gallons, and no more.

SEC. 3. That water rates may be collected by said persons, firms, companies and corporations from all consumers, falling within the provisions of sections one and two of this ordinance, who have water meters attached, monthly, quarterly or semi-annually, at the election of said persons, firms, companies or corporations furnishing the water, but water rates shall not be collected in advance except by voluntary consent of the consumer.

Water may be shut off from any water consumer for non-payment of water rates or other sufficient reason, only after ten days' written notice served upon said consumer or his wife, his absence from home, or in case of absence from premises of both husband and wife, then the said notice shall be delivered by depositing same in the Owensboro post-office addressed to said water consumer.

SEC. 4. That if any person, firm, company or corporation shall be or become a consumer of water and shall not be included in the classifications made and contained in the second section of this ordinance, the quantity used or consumed by such consumer shall be

ascertained by meter and compensation therefor at the rates and charges specified in the first section of this ordinance.

SEC. 5. That all persons, firms, companies and corporations furnishing water to consumers in the city of Owensboro that shall have mains, pipes and conduits in the streets, alleys and public ways of the city, shall hereafter during the months of April, May, June, July, August, September, October, November, in each year, cause all water mains of said persons, firms, companies and corporations to be washed and cleaned, and for this purpose shall cause all fire hydrants to be opened to their full capacity and water discharged from each for at least five minutes once in every two weeks; and during the months of December, January, February and March shall for said purpose cause all fire hydrants to be opened to their full capacity for at least five minutes once in each and every of said months last mentioned.

SEC. 6. That hereafter all persons, firms, companies and corporations engaged in the business of furnishing water to consumers, shall keep an exact, complete and true account of all its incomes, gains and receipts from all and every source whatever, in detail, giving all the items thereof and date of receipt of same, and an exact, complete and true account of all expenditures, showing date and amount of each and every item of expense, costs and expenditure and the whole thereof; and the books containing said accounts shall be kept at Owensboro, and shall be open at any time to inspection and examination by the common council or a committee thereof appointed for that purpose, and shall make and return to the common council, at the end of each six months thereafter, on the first day of January and July in each year, a true and complete summary of the same, which shall be verified by the oath of the president, secretary or treasurer of said persons, companies, firms or corporations furnishing water, and the said reports shall be spread on the journal and filed and preserved by the city clerk in his office.

SEC. 7. That it shall be the duty of any person, firm, company or corporation engaged in the business of furnishing water to consumers thereof, in the city of Owensboro, through pipes, mains or conduits, laid in the streets, alleys and ways of said city, to furnish water to all persons who may make application in writing, and within ten days after the date fixed in such written application, and who desire the same furnished in houses or places situated on any of the streets, alleys or ways or places in the city wherein any of the said mains, pipes or conduits are located or laid, and the said person, companies or corporations shall put down all necessary pipes therefor at the expense of the person, firm, company or corporation furnishing the water to the boundary line of the lot or premises of the applicant for water or consumer, and the remainder of the pipes, machinery or appliances necessary for conveying the water into the houses or upon the premises shall be borne by the said applicant or consumer of water.

SEC. 8. That if any person, firm, company or corporation engaged

in the business of furnishing water to consumers thereof in said city of Owensboro, shall demand, charge, exact or receive, directly or indirectly, of or from any consumer or consumers of water in said city, as consideration or compensation for water furnished or supplied to such consumer, any money, property or other thing of value over and above or in excess of the rates and prices for water herein named and prescribed, or shall fail or refuse for ten days without reasonable excuse to supply water as prescribed and required in and by section seven (7) of this ordinance; or shall fail or refuse to keep the accounts or the books required to be kept at Owensboro, or make the reports in writing to the common council, as required by section sixth (6) of this ordinance, such person, firm, company or corporation so offending shall be fined, upon conviction, in a sum not less than ten and not exceeding fifty dollars, for each offense.

SECTION 9. This ordinance shall go into full force and effect on and after the first day of April, in the year of our Lord nineteen hundred.

Again on Monday, March 19th, 1900, defendant city, acting through its mayor and common council, again caused the above quoted ordinance to be read and placed upon its final pas-
16 sage, and by a yea and nay vote, defendant, by its common council, sitting in special session, attempted to and did pass said ordinance, there being eleven votes cast in favor of its adoption, which was more than a quorum, and more than two-thirds of all the duly elected and qualified members of said city council.

Your orator further shows that on the following day, to wit, on the 20th day of March, 1900, W. P. Small, acting for and on behalf of defendant city, as mayor thereof, signed and approved said ordinance, and defendant city is now claiming that said ordinance is a valid law, and is threatening to enforce both its civil and penal provisions, and will do so unless restrained and prevented by this honorable court.

If said ordinance is enforced, either its civil or its penal provisions, your orator will suffer great and irreparable loss and damage, and will be prevented from conducting, managing and controlling its business.

Already defendant city has caused printed copies of the ordinance above quoted to be circulated among the inhabitants of the defendant city, and among those to whom the complainant company is and for years past has been furnishing water.

Complainant believes and charges the fact to be that the passage, printing and circulating of said ordinance was and is for the sole purpose of wrongfully and illegally interfering with the orderly and legal conduct of the complainant's business, to confuse and to interfere with the complainant's reasonable regulations and rules in regard to collection of its water rents, and if said ordinance can be enforced (and it will be unless the court enjoins its enforcement) complainant will suffer great and irreparable loss and damage in this, it will lose at least forty per cent. of its water rents, because, except as it can be allowed to collect its water rents in advance,

there will be at least forty per cent. of those who consume water furnished by the complainant company who, from one cause or another, will fail to pay complainant, and it will be unable to enforce the collection of these water rents and thereby suffer great loss and damage.

Moreover, many persons who now patronize it will cease to do so, unless complainant submits to the unjust, unreasonable and unconstitutional provisions of said ordinance.

By the alleged ordinance aforesaid, defendant city, if wrongfully, illegally and in violation of its contract, asserting the right to regulate the prices complainant shall charge the citizens of defendant city to whom it furnishes water, and, moreover, to regulate
17 and fix the time when and the manner in which consumers shall pay their water rents, and generally supervise, control, manage and regulate complainant's business, and its mode of conducting same.

Your orator further shows that among other provisions in the ordinance aforesaid, it is provided, if the complainant violates any of the provisions of the alleged ordinance, fixing water rates, and designating the time when, and the manner in which consumers shall pay the rent, and if complainant shall attempt to enfore the collection of water rents, except as prescribed in said ordinance, it shall be subject to a penal prosecution in the police court of the city of Owensboro, and fined not less than ten, nor more than fifty dollars, for each violation of said ordinance.

The defendant city, nor its mayor and common council, had or has any authority, power or jurisdiction to pass said ordinance, and the penal as well as the other provisions thereof are void, and not only unconstitutional, but cruel and excessive.

It says the ordinance above quoted is void, for a lack of power and authority in the defendant city, or its mayor and common council to enact same. In no event and under no circumstances has defendant city power or authority to enact or enforce the penal provisions of said ordinance.

In addition to this, defendant city had and has no power, authority or right to pass or enforce said ordinance, because, under the contract of the defendant city with the complainant, and in virtue of the quoted ordinances and agreements, the sole right to fix water rates, the terms and conditions on which complainant will provide water to private consumers, rests and is vested in virtue of its contracts with defendant city, in complainant, and defendant city, nor its mayor and common council, has any power or authority over the subject, and it pleads and relies on the ordinance and contracts aforesaid, and on the general law, as conferring upon it the rights herein claimed and as establishing an utter lack of power and authority on the part of the defendant city, as mayor and common council, to pass the alleged ordinance last above quoted, or to enforce any of the provisions thereof.

The ordinance is void because it impairs the obligation of a contract made by the defendant city with the complainant under ordi-

nances and contracts aforesaid, and is in violation of the constitution of the State of Kentucky, which provides that no *ex post*
18 *facto* law, nor any law impairing the obligation of contracts, shall be exacted.

The said ordinance is void, because it is in violation of so much of article 5 (fifth amendment) to the Constitution of the United States, as provides, that "private property shall not be taken for public use, without just compensation," and it is in violation of the constitution of Kentucky, for the same reason.

The alleged ordinance of March 19th, 1900, is not only unconstitutional and void for the reasons already stated, but it is unconstitutional and void because it is in conflict with the following c-ause of the fourteenth amendment to the Constitution of the United States, which provides:

"No State shall make or enforce any law, which will abridge the provisions or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its precincts the equal protection of the laws."

Your orator relies on each and all of the foregoing mentioned constitutional provisions of the State and national constitutions, and upon its contracts and the ordinances of the city of Owensboro hereinbefore quoted, to show that the proposed ordinance, enacted by defendant city of March 19th, 1900, is without any vital force, and that it is void.

V.

Your orator further shows that under the proposed ordinance of March 19th, 1900, which defendant city is threatening to enforce, and which it will enforce unless prevented by a judgment of this court, is unreasonable, inequitable and unjust.

If the ordinance is enforced, the entire annual revenues, which it would be possible for complainant to earn under the terms and provisions of said ordinance, would not amount to as much as $17,000.00 per annum, if all its earnings could be collected.

But it says, under the provisions of said alleged ordinance, it would lose of its water rentals and earnings, as before stated, from thirty to forty per cent.

Complainant says that the actual necessary expenses of operating its water works system in the city of Owensboro, and which it is obliged to necessarily incur in carrying out its contract with defendant city, and in furnishing to the private consumers of the city, water, is annually more than $13,000.00; this sum it is obliged
19 to incur in the way of expenses under the most prudent and economical administration of its water works system.

In addition to the actual necessary expenses of operating its water works, it is annually subjected to a large amount of taxes, municipal, county and State, which taxes amount annually to from $2,500.00 to $4,000.00, and this is a proper item to be added to the necessary expenses of operating its water works system.

Besides the natural wear and tear of its machinery, its pipes, hydrants, mains, and other appliances amount *to* annually to a large sum and its natural wear and tear it is obliged to keep up, subjects it annually to an additional expense of not less than $4,000.00.

The total annual revenues of complainant company are derived from the rent of its hydrants to the city and its income from rentals paid and agreed to be paid by individual consumers to whom it supplies water. Besides these sources of revenue it has no other.

Under the proposed ordinance, if its provisions are enforced, complainant could not, under the most prudent management, earn any per cent. upon its investment, but would be compelled to operate its plant at an actual loss.

If said ordinance is enforced, it can not operate its water works plant, or carry out its contracts with the city of Owensboro and the inhabitants thereof, except at a pecuniary loss to it, and the enforcement of said ordinance will in substance and in fact require complainant to furnish to the city of Owensboro, and to its citizens, water privileges and water protection, not only without compensation, but at an actual cash loss to it, on the present value of its plant, of not less than $7,000.00 per annum.

The ordinance of March 19th, 1900, is for this reason and for the reasons previously alleged, in direct violation not only of the Constitution of the United States, already quoted, but of that provision of the constitution of Kentucky, which stipulates:

"Nor shall any man's property be taken or applied to a public use without the consent of his representatives and without just compensation being made to him," and it is in express violation of the provisions of the Constitution of the United States, already quoted herein.

Your orator further complains and says, pursuant to a power invested in it by the charter of the city of Owensboro, the mayor and common council of defendant city, had prior to the 19th day of March, 1900, fixed the first and third Mondays of each month as the days on which it should hold its regular meetings, for the transaction of business, and except at these stated and fixed periods the said council could not legally assemble for any purpose, except in extraordinary session, and then only upon the call of the mayor of defendant city.

The ordinance complained of herein was not introduced or passed at a regular session of the council of defendant city, but at a special or extraordinary session.

On the 12th day of March, 1900, the mayor called a special meeting of the common council to meet on that day, to consider the ordinance complained of herein.

This was without notice of any kind to complainant, nor did it have any knowledge that the ordinance would be considered at the regular meeting of March 19th, 1900.

On the 15th day of January, 1900, the common council of defendant city, being in regular session, appointed a committee from

among the members of its body to investigate and report what would be fair rates to be charged by this complainant to the consumers of water furnished by it, that committee was given power to send for persons and papers, and to take evidence and report to the said council the result of its investigation, and defendant city thereby determined that such investigation was necessary before it could legally proceed to act in the premises in any event.

The committee thus appointed never discharged or pretended to discharge any part of the duty imposed upon it by said resolution.

It never investigated or attempted to investigate the subject, nor did it ever report to the council at any time. It fixed no time or place for its meeting and never gave any notice to complainant, or any of its agents or employés, when or where it would meet.

It never gave the complainant an opportunity to be heard or to present to the said committee, or to the defendant's council, books or papers or to make any statement touching the proposed ordinance or the reasonableness or unreasonableness thereof.

Defendant, by its council, never at any time or place investigated or considered the water rates at present charged by complainant. It never heard or offered to hear any evidence on the subject and defendant city never determined whether the rates now and heretofore established by complainant and at present in force are reasonable or unreasonable.

But defendant city illegally, without right and by an *exparte* and partisan proceeding, proceeded to pass said ordinance without giving complainant any opportunity to be heard, although it
21 had passed a resolution in the beginning declaring its judgment that there should be an investigation before any attempt was made to interfere with the rates for water rent established by complainant.

Defendant city in no event, in view of its ordinances, its stipulations, contracts and agreements with complainant, as hereinbefore set out, had any right, power or authority to pass the ordinance or to make the rules or regulations attempted to be made therein, and the same is void, if for no other, for that reason alone.

The rates and rules fixed in said ordinance, each and all of them, are unjust, unreasonable and void, and if said ordinance is enforced the direct effect will be not only to prohibit complainant from operating its water works system in the city of Owensboro, but will result in confiscating its property.

Your orator believes and charges the fact to be, that the introduction and passage of the ordinance complained of by defendant city was in pursuance of a fraudulent scheme or campaign policy, to which the present members of defendant city's council committed themselves in advance of their election, without ever having investigated the subject at all and in consummation of a scheme formed by them, and others conspiring with them, to destroy complainant's property, before they were elected, and for this reason the said ordinance is void.

The ordinance complained of was hurried through the council,

with the intention of depriving complainant of its property without compensation, and with the intention and for the purpose of depriving it of a hearing before said body, and with a view of so reducing the rates of water rents as to not only deprive it of any income upon its investment, which it alleges the said ordinance does, but to make it impossible for complainant to maintain and operate its system of water works in the city of Owensboro.

Defendant city, neither by its mayor nor common council, nor at all, investigated or attempted to investigate what would be a reasonable rate of water rents, but acted *exparte* and arbitrarily.

Neither defendant city nor any of its agents, including its mayor and common council, did not at the date of the passage of said ordinance know nor inquire how much money complainant had invested in the construction of its water works system in defendant city.

It did not know, neither did it investigate, or attempt to find out, what the necessary annual expenses of operating its said sys-
22 tem were, nor did it know or investigate, or attempt to investigate, the depreciation by natural wear and tear resulting to complainant's system of water works from its constant use.

Defendant city, its mayor and common council, did not know, nor did they attempt to ascertain, or fix water rates so as to give complainant a fair, or any returns, upon its actual cash investment, estimated upon a reasonable and fair value of its property used in constructing its said water works system, at the time it fixed the rates in said ordinance.

It did not know, nor attempt to find out, the reasonable costs per annum of operating said works, the value of its plant, or its annual depreciation resulting from natural wear and tear.

Your orator says the action of the defendant through its common council in fixing the rates in the ordinance complained of, were arbitrary, unreasonable and unjust, and fraudulent to the complainant.

It believes and charges the fact to be true, that the motive and purpose of the common council of the city of Owensboro in passing and in having printed and distributed copies of the alleged ordinance of March 19th, 1900, and in circulating the same among the citizens of the city of Owensboro, which it has done, was with the intent and for the purpose of harassing, annoying and worrying the complainant, and to encourage its water consumers not to pay the water rents which will be due on the first day of April, 1900, and to render it impossible for the complainant to collect said water rents when due, and to comply with its contract, and to destroy the value of its property.

VII.

Your orator states that the provision of the alleged ordinance complained of that provides that water rates can only be collected from consumers monthly, quarterly or semi-annually, but not in advance, except by the voluntary consent of the consumer, and in providing that water can not be shut off from the consumer for non-

payment of rent, except upon ten days' notice, would result, if said ordinance was enforced, in a pecuniary loss to the complainant of from thirty to forty per cent. of the revenues professed to be provided for by said alleged ordinance.

VIII.

Your orator further shows that the stipulations and provisions in the ordinance complained of are not only unjust, without
23 right and in violation of law, but in direct violation of the vested rights of complainant under its contract and under the previous ordinances of defendant city, both with its vendor, Owensboro Water Company, to all the rights and privileges *of* which complainant succeeded under the various ordinances and contracts hereinbefore set out; among which was the right to fix its own water rates with private consumers and the time and mode of paying same.

Your orator further shows that in 1878, the city of Owensboro was without a system of water works, the inhabitants were without water for domestic use, except such as was collected in wells and cisterns, which were not only wholly inadequate, but the water supposed to be, and it was in fact, unhealthy, and the city in the matter of fire protection was at that time practically without any fire protection whatever, and was in fact at the mercy of the fire fiend, and the elements.

As an inducement to the Owensboro Water Company, complainant's vendor and predecessor, defendant city by appropriate ordinances and contracts, acting within the scope of its authority and as an inducement to said Owensboro Water Company to establish and maintain a system of water works in the city of Owensboro, granted to it the franchises hereinbefore set out, and also granted to it the rights and privileges also hereinbefore set out, including the right during its corporate existence to fix the rates of water rents with private consumers, and to regulate the time and mode of paying said water rents.

Among the other grants to the Owensboro Water Company, complainant'ss vendor and predecessor, was the privilege and rights that it should establish rules, regulations and rates of water rents, to its private consumers and by appropriate rules to prescribe the manner and mode of paying the water rents.

All of these rights, defendant city granted originally to the Owensboro Water Company, and thereupon the said water company did establish its system of water works, in the city of Owensboro, on the faith of said grants, which were valuable to it, and which constituted a sufficient consideration upon which to uphold the agreement between it and the defendant city.

Acting upon the faith of these grants and upon the faith of the defendant city's agreement and contract with this complainant, tha said city would and did assign, transfer and grant to it, all tht rights, privileges and franchises which it had theretofore granted te

the Owensboro Water Company, and further in consideration
24 of the representations undertaking, and grant of the defendant city to the complainant, that it should possess and exercise all the rights and privileges granted to its predecessor, the Owensboro Water Company, and those granted to the complainant in the ordinances and contracts aforesaid, this complainant purchased of the said Owensboro Water Company its system of water works in the city of Owensboro, and this it did alone on the faith of the grants to it and its predecessor, the Owensboro Water Company, by the city of Owensboro which defendant city then by appropriate legislative act, then transferred and assigned to complainant as an inducement to it to buy the plant of the Owensboro Water Company.

On the faith of the grants and contracts aforesaid and of the franchises and privileges granted to it by the defendant city, it has from time to time since said date expended large sums of money in extending its water works system, throughout the city of Owensboro, the city of Owensboro, having far outgrown the population it had when the Owensboro Water Company established its plant originally, which it would not have done except on the faith of the contracts, franchises and privileges granted to it, which franchises and privileges were, as shown by the said ordinances and contracts, granted to the complainant during its entire corporate existence.

Its said corporate life under its articles of incorporation does not expire until 1911.

The defendant city having granted the powers, privileges and franchises aforesaid, among which *were* the right of the complainant to make all necessary rules and regulations between it and private individuals who consumed the water furnished by it, has not and never has had the power or authority to regulate or control the complainant company, in its rules and regulations, with respect to its private consumers of water, nor to prescribe the terms of its contracts, with them, nor the mode or manner in which it should collect its water rents.

By the ordinances and contracts aforesaid all such powers, rights and privileges are vested in complainant under its charters, agreements and contracts aforesaid and the attempt of the defendant city now to interfere with, or to regulate or in any manner to control its water rates to private consumers, and the time when, or the mode in which it should collect such water rents is in violation of the contracts, privileges and franchises granted to the complainant company, and in violation of the privileges, rights, immunities and franchises granted to its predecessor, the Owensboro Water Company, all of which were transferred, assigned and delivered by defendant city to complainant.

25 Your orator further shows, that it has invested large sums of money on the faith of the privileges, grants and franchises, conferred on it by the defendant city, in extending and perfecting its system of water works in the city of Owensboro and which was necessary to furnish defendant city sufficient fire protection and its

inhabitants water, and to furnish complete fire facilities to defendant city, and to furnish an ample and ready supply of water to all the inhabitants of said city.

It says that the defendant city, is estopped now to assert or exercise any power or control or authority on any of the subjects referred to in the ordinance, herein complained of, and its pleads and relies upon such estoppel in bar of the enforcement of the alleged ordinance.

Moreover, the defendant city in no event under the general law possesses any such power or authority as that attempted to be exercised by it in said ordinance.

Your orator further states that the stipulation-, rules and regulations contained in the ordinance complained of are unjust, inequitable and illegal, in any event for the reason that the enforcement of the said ordinance will utterly deprive it of the power, not only to earn an income, on its investment, but will result in disabling it from performing its contracts and deprive it of its property without compensation and without due process of law.

Among other things in the said ordinance, it requires complainant to submit to the judgment of the mayor of the said city in respect to placing meters in all houses of private consumers, and this in itself would subject it to an unreasonable and an enormous outlay of money, which would not only materially, but ruinously, effect its financial interests.

It says experience has shown and it is true that it is necessary to collect water rents from its private consumers in advance, and that any other rule or regulation will subject it to an actual loss in its total water rents of from fifteen to twenty-five per cent.

Experience has also shown that it is absolutely indispensible to collect the water rents in advance, not only for the protection of the complainant company, but to protect its water consumers who do pay their water rent, in order that it may thereby furnish such consumers as always pay, water at a minimum price.

It says defendant city — pretending that the alleged ordinance of March 19th, 1900, has been regularly passed; that it is now a law, and is threatening to enforce the same and it will proceed to
26 do so, and to prosecute plaintiff for alleged violations and infractions of said ordinance, and it is threatening to arrest and prosecute plaintiff for any and all infractions of said alleged ordinance, and to fine and imprison its employés, agents and managers except as they submit to its illegal unjust and unconstitutional ordinance, and it will do so unless restrained and prohibited by the judgment of this court, and unless restrained and prohibited it will suffer irreparable loss and damage.

The defendant Lawson Reno, — the police judge of the defendant city, and as such the alleged ordinance confers on him the jurisdiction of trying the complainant, its employés, agents and managers for any and all violation- and infractions of said ordinance, and it is made the duty of said Reno, as said judge, to see to the enforcement

of said ordinance, and he will do so unless prohibited and restrained by the orders and judgment of this court.

If the complainant is not protected by an injunction herein, it will — subjected to numberless prosecutions under said ordinance, in the police court, of said city and subjected to great costs, vexation, and annoyance and to great and irreparable loss and damage on that account.

If the relief sought herein is not granted, complainant, its agents, managers and employés will be arrested, prosecuted, tried and convicted in the police court of the defendant city and it will be without remedy to protect itself against the illegal, unjust and unconstitutional ordinance of March 19th, 1900, and it will on that account, suffer irreparable loss and damage, and be subjected, not only to vexatious prosecutions, but to great, unnecessary and illegal costs.

No previous injunction has ever been asked, granted or refused by this or any other court, or by any judge or clerk thereof.

Wherefore, your orator prays, that your honors grant unto your orator, your writ of injunction, commanding said defendant, The City of Owensboro, and Lawson Reno, the police judge of defendant, City of Owensboro, and all persons claiming to act under their authority, discretion or control, to absolutely *r*esist and refrain from any effort or pretense to enforce the alleged ordinance herein quoted of March 19th, 1900; that the defendant city and its police judge, aforesaid, be commanded to absolutely *r*esist and refrain from pretending, claiming or asserting that the said ordinance or any section thereof is valid for any purpose.

It prays your honors that the defendant, The City of Owensboro be absolutely enjoined from asserting, claiming, or pretending to
27 assert or claim that it *is* a municipality has any power, right or authority to interfere with, or to regulate by ordinar*y* or otherwise the water rates of your orator with its private consumers. That it be directed to absolutely *r*esist or refrain from claiming or pretending to claim that it has any right, power or authority in virtue of its corporate existence or otherwise, to fix the time when, or the mode in which the complainant shall collect its water rents from private consumers; that it be commanded to absolutely *r*esist and refrain from the enforcement of any one of the provisions of the ordinance of March 19th, 1900; that it be restrained absolutely from circulating among the citizens of Owensboro the pretended and fraudulent ordinance herein quoted, wherein it is attempted to be provided that the private consumers of water who have contracted with complainant to furnish them water shall not pay their water rents in advance, or that complainant shall only collect its water rents monthly, quarterly, or every six months, or that it shall give notice as provided in the alleged ordinance before it turns off or ceases the flow of water to private consumers who do not pay their water rents; and that defendant city be commanded to absolutely *r*esist and refrain from pretending that your orator has not the rights and privileges of prescribing its own rules and regulations with respect to water rents and the mode of collecting same; that

defendant city be commanded to absolutely resist and refrain from interfering in any way with complainant's rules and regulation with respect to the collection of water rents from private consumers and that said defendant city and the defendant Lawson Reno, police judge of the said city, be commanded to absolutely resist and refrain from enforcing any of the provisions of the said ordinance, and from issuing any warrants for the alleged violation thereof and *for* prosecuting your orator, or any of its employés, agents or servants for any violation of said ordinance, until such time as your honors shall appoint and direct and order herein and that upon such hearing the writ of injunction herein prayed for be made and confirmed until the final determination of this suit and that thereupon the said injunction may be made perpetual.

Your orator prays for the writ of subpœna against the defendant, and it prays for all that just and equitable relief, which to a court of equity belongs.

BINGHAM & DAVIES AND
SWEENEY, ELLIS & SWEENEY,
Attorneys for Complainant.

28 J. T. Ellis says he is the vice-president of the complainant company and that he is its chief officer and agent in this county and State, that D. L. Miller, its president is absent from this State and he believes that the statements in the foregoing complaint are true.

J. T. ELLIS.

Subscribed and sworn to before me by J. T. Ellis this the 28th day of March, 1900.

[SEAL.]

J. C. GRIFFITH, *Clerk.*
J. H. TAYLOR, *D. C.*

Articles of Incorporation.

The undersigned, Samuel A. Miller, Americus F. Callahan and William Reinecke, all of Louisville, Kentucky, as corporators, have associated themselves, their associates and assigns, together to become and be incorporated, as a corporation for transacting the business of a waterworks company under the provisions of chapter 56 of the General Statutes of Kentucky, and its amendments, and they have adopted these articles of incorporation:

1. The name- of the corporators of the said corporation are the following: Samuel A. Miller, of Louisville, Kentucky; Americus F. Callahan, of Louisville, Kentucky, and William Reinecke, of Louisville, Kentucky.

2. The name of said corporation is the Owensboro Water Works Company, of Owensboro, Kentucky.

3. The principal place of transacting the business of the said corporation is the city of Owensboro, in the county of Daviess, in the State of Kentucky.

4. The general nature of the business proposed to be transacted by the said corporation is to acquire the waterworks of the Owensboro Water Company, a corporation organized and existing under the laws of the State of Kentucky, and its contracts for supplying the city of Owensboro and its inhabitants with water, and to maintain and operate waterworks in the city of Owensboro, in the county of Daviess, in the State of Kentucky, for supplying the said city of Owensboro and the inhabitants of the city and its vicinity with water for public and private purposes.

5. The authorized amount of capital stock of the said corporation is (subject to the power of increase hereinafter mentioned) the sum of three hundred thousand dollars, divided into three thou-
29 sand shares of one hundred dollars each. Five thousand dollars thereof are to be paid in cash immediately upon the organization of the said corporation and two hundred and ninety-five thousand dollars are to be issued in fully paid certificates as a part of the consideration to be paid to the said Owensboro Water Company for the purchase of its waterworks and contracts. The board of directors may increase the amount of the capital stock from time to time to a total amount not exceeding five hundred thousand dollars.

6. The time of the commencement of the said corporation is the first day of June, in the year one thousand eight hundred and eighty-nine, and it shall terminate twenty-five years thereafter, subject to such extensions of its term of existence as by law provided.

7. The affairs of the said corporation shall be conducted by a board of directors of five stockholders, and by the following officers: A president, a vice president, a secretary, and a treasurer. The board of directors for the first year shall consist of Samuel A. Miller, John Long, Americus F. Callahan, William Reinecke and Henry P. Martin. Annual elections of the board of directors shall take place at the annual meetings of the said corporation on the first Saturday in June of each and every year, beginning with the year 1890. The officers shall be elected by each board of directors as soon as convenient after the election of the respective board for the term of the said board.

8. The highest amount of indebtedness or liability direct or contingent to which the said corporation is at any time to subject itself, or to be subject shall not exceed two-thirds of its capital stock.

9. Among the powers of the said corporation shall be the following: To have perpetual succession, to sue and be sued by the corporate name. To have a corporate seal and to alter the same at pleasure, to render the shares and interests of the stockholders transferable, and to prescribe the mode of working such transfers, to exempt the private property of members from liability for corporate debts, to make contracts, acquire and transfer property possessing the same powers in such respects as private individuals enjoy, to establish by-laws and make all rules and regulations deemed expedient for the management of the affairs of the said corporation,

not inconsistent with the constitution or laws of this State or of the United States.

10. The private property for the corporators and stockholders is to be exempt from the corporate debts.

Witness the hands of the said corporation this thirtieth
30 day of May, in the year one thousand eight hundred and eighty-nine.

SAM'L A. MILLER.
AMERICUS F. CALAHAN.
WM. REINECKE.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

I, Geo. H. Webb, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing articles of incorporation were produced to me in my office and acknowledged and delivered by Sam'l A. Miller, Americus F. Callahan and Wm. Reincke, parties thereto to be their act and deed, all of which is hereby certified to the proper office for record.

Witness my hand this 1st day of June, 1889.

GEO. H. WEBB, *Clerk,*
By W. E. BUCKEL,
Deputy Clerk.

STATE OF KENTUCKY, }
Daviess County, } *sct:*

I, M. S. Mattingly, clerk of the Daviess county court, do hereby certify that the foregoing articles of incorporation of the Owensboro Water Works Company were this day lodged in my office, certified as above, and together with the foregoing and this certificate duly admitted to record.

Witness my hand this June 3, 1889.

M. S. MATTINGLY, *Clerk,*
By R. A. HOGAN, *D. C.*

A copy attest:

J. T. GRIFFITH, *Clerk,*
By CLINT GRIFFITH, *D. C.*

An ordinance authorizing the construction and operation of waterworks in the city of Owensboro and granting certain franchises and contracts to the Owensboro Water Company.

Be it ordained by the mayor and city council of Owensboro:

SEC. 1. That the privilege is hereby granted to the Owensboro Water Company, a corporation organized under the laws of the State of Kentucky, and to its successors and assigns, for the duration of the said company, to construct and operate in the city of Owensboro, waterworks for the supply of said city and the inhabitants
31 thereof with water from the Ohio river for public and private purposes and to use the streets, alleys and other public high-

ways within the present and future limits of said city for the purpose of laying and repairing pipes, conduits, hydrants and fountains for the supply of water. But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and they shall be restored by said company as near as practicable to their former condition.

All other property of said company shall be located on private ground.

SEC. 2. The said waterworks shall be constructed upon the plan of pumping water into the pipe system directly from the Ohio river, but after the expiration of two years from the completion of said works, upon being required to do so by a vote of two-thirds of the members of the city council the said company shall erect a stand pipe of the size, and character hereinafter mentioned.

SEC. 3. The power and capacity of said works shall be sufficient to throw four streams of water at one time over the roof of any house now on the line of the eight inch pipe; or to throw three streams of water at one time over the roof of any house now on the line of the six inch pipe; or to throw two streams of water at one time over the roof of any house now on the line of the four inch pipe; each stream to be from a separate hydrant through five hundred feet of two and one-half inch hose and a nozzle of one and one-quarter inch in diameter. The said company shall at all times be ready, unavoidable accicidents excepted, to supply a sufficient quantity of water for the necessities of public and private use; to keep all hydrants rented of it by said city in good repair and ready for instant use in extinguishing fires by the fire department of said city, and to furnish direct pressure from the pumps when a fire alarm is given to the party in charge of the pumping machinery.

SEC. 4. When the hydrants or fountains rented of said company by said city shall be out of repair and said company shall neglect or fail, within reasonable time after written notice by said city, to put the same into thorough repair and good working order, the said city shall not be liable for any rent of such hydrant or hydrants, fountain or fountains, during the time same shall continue to be out of repair after such notice.

SEC. 5. In the event of a failure by reason of willful neglect and mismanagement of said company, to supply a sufficient quantity of water to the said fire department, the said city shall not be
32 liable for any rent of hydrants and fountains during the time of such failure. And the hydrants rented by the said city shall be used by it only for the extinguishment of fires and for washing between the hours of ten and eleven o'clock a. m., the public sewers and gutters and the city wharf, not exceeding one hour during any day and two streams only shall be thrown in washing at one and the same time.

SEC. 6. The pump house of said company shall be built of brick and shall be of handsome design and finish, with a brick smoke-stack seventy-five feet high above the ground, and shall be of sufficient size to accommodate the operative machinery of said com-

pany. There shall be two steam pumps of the most approved construction having a capacity when working together to pump two million gallons of water in twenty-four hours. To each shall be attached one of Buckley's patent condensors, and there shall be two steam boilers of sufficient size, each attached to its respective pump. In the event that the company shall be required to build a stand pipe, the stand pipe shall be constructed of wrought iron plates, riveted together, twenty feet in diameter and one hundred feet high, upon a foundation of brick or stone, laid in cement. The pipe system shall be in the following streets, viz:

In Main street from Pearl to Walnut streets.....	4200 feet.
In Third street from Pearl to Walnut streets.....	4200 feet.
In Fourth street from Center to Walnut streets.....	4600 feet.
In Seventh street from Center to Walnut streets.....	4800 feet.
In Walnut street from Main to Seventh streets.....	2800 feet.
In Locust street from Fourth to Seventh streets.....	1800 feet.
In Fredrica street from Main to Seventh streets.....	2800 feet.
In Crittenden street from Main to Seventh streets.....	2800 feet.
In Center street from Fourth to Seventh streets.....	1800 feet.
In Pearl street from Main to Fourth streets.....	800 feet.
Total, about.....	30600 feet.

The said pipe shall be of cast iron, warranted to stand a hydrostatic pressure of 250 pounds per square inch cast on end flasks free from any flaws or defects and coated with Dr. Smith's patent
33 coal tar varnish. There shall be one cross, one tie and one fire hydrant, having two discharge nozzles, at each intersection of streets, with a sufficient number of stop valves, protected by iron valve boxes, to form a complete cut off system from said works. The nozzles for the hydrants shall be made to fit the hose now in use by the fire department.

SEC. 7. The said pump house and its appurtenances shall be located within the corporate limits of the said city if the council so desire, and the water to supply the said city and its inhabitants shall be taken by said company from the Ohio river at a point above the present drainage or sewerage of said city.

SEC. 8. Should the said city adopt a fire alarm, telegraph or telephone, the said company shall convey at its expense the wires from its pump house for the length of not exceeding one thousand feet to the nearest box or station, and shall connect the wires at the pump house with some suitable device to produce alarm signals.

SEC. 9. The said company shall have the power and authority to make and enforce as part of the condition upon which it will supply water to its consumers, all needful rules and regulations, not inconsistent with the law or provisions of this ordinance.

SEC. 10. The said city will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition, and against injury to the

hydrants rented by it to said city and against waste of water by consumers.

SEC. 11. The said company shall commence in good faith the construction of said works within thirty days after the passage of this ordinance and shall continuously and diligently prosecute said construction until the completion and successful operation of the same; in default whereof the city council may by vote of two-thirds of its members declare the contract of said city for the payment of said fire service to be forfeited and void.

SEC. 12. The said city shall have the option and privilege at any time after the expiration of ten years from the passage of this ordinance, to purchase the said water works with all its properties and franchises, the price to be ascertained in the following manner: Three disinterested persons of good intelligence, not residents of Owensboro or of Daviess county, Kentucky, shall be chosen, one of them by said city, another by the said company, and the third by the first two; and the three or their majority shall make an award, to the amount of which shall be added ten per centum
34 thereof; and the said city shall have the option of refusing to purchase after said award shall have been made, or to pay to said company in cash within three months from the date of said award the said award and in addition the said ten per centum; but in that event the said city shall assume as a part of the sum to be paid and shall pay the bonded and floating indebtedness of said company.

SECTION 13. In consideration of the benefits which will be derived by the said city and its inhabitants by construction and operation of said water works and in further consideration of the risk of so large an investment by said company in said city in a new and untried enterprise, the rights, privileges and franchises hereby granted to and vested in said company shall remain in force and effect for twenty-five years from the passage of this ordinance, and the said company shall be exempt from the payment of all taxes which shall be assessed or levied for the use or benefit of said city for two years from the passage of this ordinance; and the said city hereby rents from the said company for the uses hereinbefore set out one fire hydrant at each intersection of streets along the lines of pipes hereinbefore mentioned, in all sixty-two hydrants, for and during the term of twenty-five years from the passage of this ordinance and agrees and binds itself to pay therefor to said company as follows, to wit: For the first fifty hydrants at the rate of seventy-five dollars each per year, and for all hydrants in excess of the first fifty at the rate of fifty dollars each per year, beginning as soon as the said works shall be put into successful operation; which sum shall be paid by said city to said company quarter-yearly on the first days of January, April, July and October of each and every year during the existence of said contract; and if any extension and extensions of pipes shall be made by said company during the said term of twenty-five years at the instance or request of said city, said city hereby agrees and binds itself to take on the line and lines of such

extensions one hydrant, as soon as completed, at each intersection of streets along the whole length of such extension and extensions, and to pay therefor for the unexpired term of said franchises at the rate of fifty dollars each per year, payable quarter-yearly at the same times hereinbefore stipulated for the first sixty-two hydrants. But the said city shall have the right to have substituted for any two of said first sixty-two hydrants, drinking fountains for man and beast, to be regulated by spring or self closing valve connected with the supply pipes, paying therefor the same compensation as is hereby fixed for hydrants.

35 SECTION 14. This ordinance shall become binding upon the said City of Owensboro as a contract in the event that the said Owensboro Water Company, within ten days after its passage, shall file with the mayor of the said city its written acceptance of the conditions of this ordinance; and after such acceptance this ordinance shall be the measure of the rights and liabilities of the said city and of the water company.

SEC. 15. An ordinance entitled "An ordinance to authorize the erection of water works and to operate and maintain the same in the city of Owensboro," passed July 30th, 1878, is hereby repealed.

SEC. 16. This ordinance shall take effect from its passage.

SEC. 17. And further that the books for subscription of capital stock shall be open in this city for ten days.

JOHN THIXTON, *Mayor.*

EBEN PARDON.

STATE OF KENTUCKY, } *sct:*
Daviess County, }

I, C. W. Wells, city clerk of Owensboro, Kentucky, certify that the foregoing is a true copy of an ordinance passed by the common council of the city of Owensboro on the 10th day of September, 1889, as appears in the minutes of a meeting of said council held on said day.

Witness my hand, this 27th day of February, 1896.

C. W. WELLS, *City Clerk.*

OWENSBORO, KENTUCKY, *September 10th*, 1878.

To the City of Owensboro:

Please take notice that the Owensboro Water Company accepts the conditions of an ordinance of the city of Owensboro entitled "An ordinance authorizing the construction and operation of water works in the city of Owensboro and granting certain franchises and contracts to the Owensboro Water Company," passed on the 10th day of September, 1878.

Very respectfully,

THE OWENSBORO WATER COMPANY,
By DENNIS LONG, *Its President.*

The above acceptance came to hand September 10th, 1878.

JOHN THIXTON, *Mayor.*

Attest: EBEN PARDON, *Clk.*

A copy attested:

C. W. WELLS, *City Clerk.*

36 COUNCIL HALL, MONDAY, *June 3rd*, 1889.

The following ordinance was submitted and read, whereupon on motion the rules of order were suspended as to voting on ordinances and the same, after its second reading, was enacted by the following vote, to wit: Ayes, Messrs. Baer, Vargason, Higdon, Cullen, Decker. Noes, none.

Whereas the Owensboro Water Works Company, of Owensboro, Kentucky, a corporation duly organized and existing under the laws of the State of Kentucky is ready to purchase the water works of the Owensboro Water Company, together with its existing contracts for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water, and whereas it is desired by the said two companies in order that the said purchase may be consummated, that the City of Owensboro grant to the said The Owensboro Water Works Company, of Owensboro, Kentucky, the franchises and license to maintain, complete and operate water works in the city of Owensboro and to use the streets, alleys and other public highways within the said city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and that the City of Owensboro accept the said The Owensboro Water Works Company, of Owensboro, Kentucky, as the successor to the contract made by the City of Owensboro with the Owensboro Water Company for hydrant rentals; now in order to enable the said companies to carry out their negotiations, and to vest the contracts of the Owensboro Water Company for hydrants as fully in the said The Owensboro Water Works Company, of Owensboro, Kentucky, as if they had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky.

Be it ordained by the common council of the city of Owensboro:

SEC. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the city of Owensboro for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the city of Owensboro the streets, alleys
37 and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water.

But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and the said grant is subject to the existing right of *purpose* of the said water works by the said City of Owensboro.

SEC. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the City of Owensboro hereby accepts the said The Owensboro Water Works Company, of Owensboro, Kentucky, as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company, as fully as if such existing contracts had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

SEC. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company, of Owensboro, Kentucky, and upon such consummation the mayor and city clerk of the city of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the city of Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, of Owensboro, Kentucky, and to accept the other in behalf of the City of Owensboro when signed and sealed by the said The Owensboro Water Works Company, of Owensboro, Kentucky.

SEC. 4. This ordinance shall take effect at its passage and publication.

JOE LEE, *Mayor.*

PHIL R. ZULAUF, *Clerk.*

A copy attest:
(Signed) C. W. WELLS, *City Clerk.*

38 An ordinance to fix and regulate rates, prices, and charges for water furnished consumers in the city of Owensboro, and for other purposes.

Be it ordained by the common council of the city of Owensboro:

SEC. 1. That hereafter every person, firm, company and corporation engaged in the business of furnishing water to consumers thereof in the city of Owensboro, shall furnish the same to such consumers thereof for domestic and manufacturing purposes and uses, and for all other purposes and uses, at rates and prices not exceeding the rates and prices herein named and fixed, which rates and prices are deemed reasonable and just; that is to say, water shall be furnished to all mills, laundries, saloons, distilleries, breweries, livery stables, ice factories, hotels, street railway companies,

and all factories and manufacturing establishments of every kind, at the following named rates, subject to the exceptions contained in section two (2) of this ordinance, to wit:

(1) In all cases where the amount of water consumed averages two thousand gallons per day, or less, estimated by the month, ten cents per thousand gallons; (2) where the daily consumption of water averages two thousand gallons, or more, and less than four thousand gallons, estimated by the month, nine cents per thousand gallons; (3) where the daily consumption of water averages four thousand gallons, or more, and less than ten thousand gallons, estimated by the month, eight cents per thousand gallons; (4) where the daily consumption of water averages ten thousand gallons, or more, and less than fifteen thousand gallons, estimated by the month, seven cents per thousand gallons; (5) where the daily consumption of water averages fifteen thousand gallons, or more, and less than twenty-five thousand gallons, estimated by the month, five cents per thousand gallons; (6) where the daily consumption of water averages twenty-five thousand gallons, or more, and less than forty thousand gallons, estimated by the month, four cents per thousand gallons; (7) where the daily consumption of water averages forty thousand gallons, or more, estimated by the month, three and one-half cents per thousand gallons.

That for the purpose of ascertaining and estimating accurately the quantity of water consumed by consumers in the classification of this section and the compensation to be paid therefor, it is hereby made the duty of the persons, firms, companies and corporations, and they shall, on request made in writing, and within thirty days
39 after such request is made, place a water meter, in good condition and repair in connection with the pipe or main leading into and supplying water to such consumers, and the said meter shall be kept in good repair by the person, firms, company and corporation furnishing or supplying the water to such consumers, and the said meters shall be examined and read monthly, for the purpose of ascertaining its condition and the quantity of water consumed.

Provided, that the minimum annual rate to be paid by all consumers of water described in the classifications thereof in this section, per annum, shall be twenty-four (24) dollars; and in no case shall the consumer of water who uses or consumed, annually, two hundred and forty thousand gallons of water, or less, be charged or pay more or less than twenty-four (24) dollars per annum.

SEC. 2. That water furnished by said persons, firms, companies and corporations to consumers thereof for domestic purposes and uses where no meter has been put in or attached for ascertaining the quantity of water used, shall be furnished at rates and charges not exceeding or above the following named rates and charges, per year, to wit:

(1) For each wash stand, wherein warm and cold water, or either, is used, two dollars; (2) for each kitchen sink, wherein warm and cold water, or either, is used, two dollars; (3) for each bath tub,

wherein warm and cold water, or either, is used, two dollars; (4) for each water closet and urinal, two dollars; (5) for sprinkling premises, lawn, pavement and street in front of or adjacent to the premises, per annum, two dollars and fifty cents for the first two hundred square yards or less, one cent for each additional square yard; (6) for private dwelling per annum where only one tap or faucet is used, containing four rooms or less, excluding hallways, garrets, bath rooms, water closets, two dollars, and for each additional room fifty cents; (7) for each cow, one dollar, for each horse, one dollar; and for each carriage, buggy and spring wagon, one dollar; (8) for filling cisterns twenty cents for each thousand gallons.

SUB. SEC. 2. And for furnishing water for offices, banks, stores and other places than residences (above specified in this section), the rates and charges therefor shall be at rates not exceeding or above the following rates and charges, per year, to wit:

For each wash stand, wherein warm and cold water, or either, is used, three dollars; (2) for each water closet and urinal, three dollars; (3) for hydrant, three dollars; (4) for barber shops, for first chair, three dollars, for each additional chair, one dollar; (5) for blacksmiths, for first forge, two dollars, and for each additional forge, one dollar; (6) for plasterers, one-fourth of one cent per square yard; (7) for bricklayers, six cents per one thousand brick, sprinkling and laying.

Provided, that any of the consumers embraced in the classification of this section may, in lieu of the above rates, require the person, firm, company or corporation furnishing the water to the consumer, to attach to the pipe leading into the premises of the consumer, a water meter, and it shall be the duty of the person, firm, company or corporation furnishing the water to attach the said meter within thirty days after said request is made therefor in writing, and thereafter the said consumer shall be charged and shall pay for the water furnished at the minimum rate of twelve dollars per annum, and for all water consumed in excess of one hundred and twenty thousand gallons, per annum, there shall be paid ten cents for each thousand gallons; but such meters shall not be attached except by the written request of the consumer.

And, provided further, that before meters are attached to or connected with the pipes or mains leading into the premises of any consumer described in the classification of this section, by the person, firm, company or corporation supplying the water, consent of such consumer shall be first obtained, and if objection shall be made by the consumer, the mayor of the city, upon complaint by the person, firm, company or corporation furnishing the water, shall summon the consumer to appear before him, and shall hear and determine the matter and decide whether the meter shall be attached, and his decision shall be final.

If said persons, firms, companies or corporations furnishing water, shall attach a meter in any case to the pipe leading into any consumer's premises, without his consent, or against his objection, and the water annually consumed shall not be as much as one hundred

and twenty thousand gallons, the consumer shall pay for the water actually consumed at the rate of ten cents per thousand gallons, and no more.

SEC. 3. That water rates may be collected by said persons, firms, companies and corporations from all consumers falling within the provisions of sections one and two of this ordinance who have water meters attached, monthly, quarterly, or semi-annually, at the election of said persons, firms, companies or corporations furnishing the water, but water rates shall not be collected in advance except by voluntary consent of the consumer.

41 Water may be shut off from any consumer for non-payment of water rates, or other sufficient reason, only after ten days' written notice served upon said consumer or his wife, in his absence from home, or in case of absence from premises of both husband and wife, then the said notice shall be delivered by depositing same in the Owensboro postoffice addressed to said water consumer.

SEC. 4. That if any person, firm, company or corporation shall be or become, a consumer of water, and shall not be included in the classification made and contained in the second section of this ordinance, the quantity of water used or consumed by such consumer shall be ascertained by meter and compensation made therefor at the rates and charges specified in the first section of this ordinance.

SEC. 5. That all persons, firms, companies or corporations furnishing water to consumers in the city of Owensboro, that shall have mains, pipes and conducts in the streets, alleys and public ways of the city, shall hereinafter during the months of April, May, June, July, August, September, October, November, in each year, cause all water mains of said persons, firms, companies, and corporations, to be washed and cleaned and for this purpose shall cause all fire hydrants to be open to their full capacity and water discharged from each for at least five minutes once in every two weeks; and during the months of December, January, February and March, shall for said purpose cause all fire hydrants to be open to their full capacity for at least five minutes once in each and every of said months last mentioned.

SEC. 6. That hereafter all persons, firms, companies and coporations engaged in the business of furnishing water to consumers, shall keep and exact, complete and true account of all its incomes, gains and receipts from all and every source whatever, in detail, giving all the items thereof and date of receipt of the same, and an exact, complete and true account of all expenditures, showing date and amount of each and every item of expense, costs and expenditure and the whole thereof; and the books containing said accounts shall be kept at Owensboro and shall be open at any time to inspection and examination by the common council or a committee thereof appointed for that purpose, and shall make and return to the common council, at the end of each six months hereafter, on the first day of January and July of each year a true and complete summary of the same, which shall be verified by the oath of the president, sec-

42 retary or treasurer of said persons, firms, companies or corporations furnishing water, and the said report shall be spread

on the journal and filed and preserved by the city clerk in his office.

SEC. 7. That it shall be the duty of any person, firm, company or corporation engaged in the business of furnishing water to consumers thereof, in the city of Owensboro, through pipes, mains or conducts laid in the streets, alleys and ways of said city, to furnish water to all persons who may make application thereof in writing, and within ten days after the date fixed in such written application, and who desire the same furnished in houses or places situated on any of the streets, alleys or ways or places in the city, wherein any of the said mains, pipes or conducts are located or laid, and the said person, firm, company or corporation shall put down all necessary pipes therefor, at the expense of the person, firm, company or corporation furnishing the water to the boundary line of the lot or premises of the applicant for water or consumer, and the remainder of the pipes, machinery or appliances necessary for conveying the water into the houses or upon the premises shall be borne by the said applicant or consumer of water.

SEC. 8. That if any person, firm, company or corporation engaged in the business of furnishing water to consumers thereof in said city of Owensboro, shall demand, charge, exact, or receive, directly or indirectly, of or from any consumer or consumers of water in said city, as consideration or compensation for water furnished or supplied to such consumer, any money, property or other thing or value over and above, or in excess of the rates and prices for water herein named and prescribed; or shall fail or refuse for ten days, without reasonable excuse to supply water as prescribed, and required, in and by section seven (7) of this ordinance, or shall fail or refuse to keep the accounts, or the books required to be kept at Owensboro, or make the reports in writing to the common council, as required by section six (6) of this ordinance, such person, firm, company or corporation so offending, shall be fined, upon conviction, in a sum not less than ten dollars and not exceeding fifty dollars, for each offense.

SEC. 9. This ordinance shall go into full force and effect on and after the first day of April, in the year of our Lord nineteen hundred.

Approved, March 21st, 1900.

Attest:

W. P. SMALL, *Mayor.*
W. M. O'BRYAN, *Clerk.*

43 COMMONWEALTH OF KENTUCKY, }
City of Owensboro, } *ss:*

I, W. M. O'Bryan, city clerk of the city of Owensboro, do certify that the foregoing eight pages contain a true copy of an ordinance, entitled "An ordinance to fix and regulate rates, prices and charges for water furnished consumers in the city of Owensboro, and for other purposes," as the same appears from the records of my office, and that I am the custodian of said records and the journal of the common council.

Given under my hand this 22nd day of March, A. D. 1900.

(Signed) W. M. O'BRYAN, *City Clerk.*

On the back of said bill in equity and the three exhibits is the following endorsement, to wit: Filed March 30th, 1900. Thos. Speed, clerk.

And on another day, to wit, on the 31st, day of March, 1901, the following proceedings were had, to wit:

Circuit Court of the United States, District of Kentucky, at Owensboro.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY,
vs.
THE CITY OF OWENSBORO ET AL.

This day came complainant by W. T. Ellis, counsel and came also the defendants by George W. Jolly, their counsel, and filed their demurrers to the bill of complaint herein. The complainant by its counsel filed notice duly executed upon the defendants, and thereupon moved the court to grant the complainant a temporary injunction as prayed for in its bill, and the court having considered the allegations of the bill, it is ordered, adjudged, and decreed that the defendants, The City of Owensboro, and Lawson Reno, judge of the police court of the city of Owensboro, Ky., be and they are hereby restrained and prohibited from enforcing or attempting to enforce the ordinance of March 19, 1900, referred to in the bill; and that the said defendants are commanded to absolutely desist and refrain from in any wise interferring with complainant in
44 the collection of its water rent, or in any manner or mode of collecting same, and from in any wise attempting to enforce any of the provisions of the ordinance of March 19, 1900, until the eleventh day of April, 1900, at which time the motion for injunction will be heard.

It is further ordered, adjudged and decreed that the complainant be allowed five days from this date in which to prepare and file affidavits to be read as evidence on the motion for temporary injunction.

The defendants are allowed five days thereafter in which to prepare and file affidavits to be read by them as evidence on the hearing of said motion. The complainant is allowed one day thereafter to file additional affidavits and affidavits in rebuttal to be read on the hearing of said motion.

Said executed notice referred to in the foregoing order is of the following words and figures, to wit:

District Court of the United States, District of Kentucky (Owensboro Division).

THE OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
CITY of OWENSBORO and LAWSON RENO, Police Judge of the City of Owensboro, Defendants.

Notice of Motion.

The defendants, The City of Owensboro and Lawson Reno, judge of the police court of the city of Owensboro, are each hereby notified that before his honor, Hon. Walter Evans, judge of the district court for the district of Kentucky, at his chambers in the customhouse building, in the city of Louisville, county of Jefferson, and State of Kentucky, on Saturday morning, March 31st, 1900, at 10 o'clock in the forenoon of that day a motion will be made by the complainant, The Owensboro Water Works Company, of Owensboro, Kentucky, asking him to forthwith grant to it a temporary order of injunction restraining you and each of you and all persons claiming to act under your authority, discretion or control to absolutely *r*esist and refrain from any effort or pretense to enforce the alleged
45 ordinance of March 19th, 1900 (wherein the city of Owensboro undertakes to fix and regulate the rates charged consumers of water in the city of Owensboro for domestic and other purposes) and that said city be enjoined from asserting, claiming or pretending to assert or claim that it, as a municipality, has any power, right or authority to interfere with or to regulate by ordinance or otherwise the water rates of complainant with its private consumers and that it be enjoined from claiming or pretending to claim that it has any right, power or authority in virtue of its corporate existence to fix the time when or the mode in which the complainant shall collect its water rents from private consumers, and that it be commanded to absolutely *to* resist and refrain from enforcement of any one of the provisions of the said ordinance and that it be restrained absolutely from circulating among the citizens of Owensboro said pretended ordinance wherein it attempts to provide that the private consumers of water who have contracts with complainant shall not pay their water rents in advance or that complainant shall only collect its water rents monthly, quartely, or every six months and that it shall give notice to its private consumers as provided in the alleged ordinance before it turns off or ceases the flow of water to private consumers who do not pay their water rents and that defendants and each of them be commanded to absolutely *r*esist and refrain from pretending that complainant has not the rights and privileges of prescribing its own rules and regulation with respect to water rents and the mode of collecting same and that defendants and each of them be commanded to *r*esist and

refrain from interfering in any way with complainant's rules and regulations with respect to the collection of water rents from private consumers and that said defendants and each of them be commanded to absolutely restrain and refrain from enforcing any of the provisions of said ordinance and from issuing any warrant for the alleged violation thereof, and from prosecuting your complainant, its employés, agents or servants for any violation of said ordinance and if said motion be not granted then for a temporary restraining order for all the purposes herein before enumerated and for such other orders as the judge may direct.

This the 29th day of March, 1900.

OWENSBORO WATER WORKS COMPANY
OF OWENSBORO, KENTUCKY,
By BINGHAM & DAVIESS,
SWEENEY, ELLIS & SWEENEY, *Attorneys.*

46 On the back of said notice are the following indorsements, to wit:

STATE OF KENTUCKY, }
County of Daviess, } ss:

On this the 29th day of March, 1900, I served the within notice on the City of Owensboro, by handing a true copy of the same to W. P. Small, mayor of the city of Owensboro, Kentucky, at his residence, No 109 West Seventh street, in the city of Owensboro, Ky., and also on the 29th day of March, 1900, I served the within notice on Lawson Reno, police judge of the city of Owensboro, Ky., by handing him a true copy of the same at his residence, number 520 Locust street, in the city of Owensboro, Kentucky.

CLARENCE M. FINN.

Subscribed and sworn to before me by Clarence M. Finn, this the 29th day of March, 1900.

[SEAL OF NOTARY.] J. C. WANDLING,
Notary Public.

Filed March 31, 1900.

THOS. SPEED, *Clerk,*
By DUDLEY LINDSEY, *D. C.*

Said demurrers referred to above in the foregoing order are of the following words and figures, to wit:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS COMPANY
against
THE CITY OF OWENSBORO ET AL.

The demurrer of the above named defendant, The City of Owensboro, to the bill of complaint of the above named plaintiff.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged demurs to said bill and for causes of demurrer shows:

I. That it appears by the plaintiff's own showing by the
47 said bill that it is not entitled to the relief prayed by the bill against this defendant.

II. That it doth not appear from the allegations contained in said bill that the complainant is entitled to the relief prayed by the bill against this defendant.

III. That the said bill is exhibited against this defendant and the other defendant to said bill, for several and distinct and independent matters and causes which have no relation to each other, and in which this defendant is in no way interested or concerned and ought not to be implicated.

Wherefore, and for divers and other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill; and it humbly prays to be hence dismissed with *his* reasonable costs in this behalf sustained.

(Signed) GEORGE W. JOLLY,
City Attorney of Owensboro.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

GEORGE W. JOLLY,
City Attorney of Owensboro.

DISTRICT OF KENTUCKY, *ss:*

W. P. Small, being duly sworn, deposes and says he is mayor of the defendant City of Owensboro, and that the foregoing demurrer is not interposed for delay.

W. P. SMALL.

Sworn to before me by the above named W. P. Small, this 30th day of March, A. D. 1900.

HORACE JOLLY,
Examiner, Daviess Co.

On the back of said demurrer is the following indorsement, to wit: Filed March 31st, 1900. Thos. Speed, clerk.

48 In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS COMPANY
against
THE CITY OF OWENSBORO ET AL.

The demurrer of the above named defendant, Lawson Reno, police judge of the city of Owensboro, to the bill of complaint of the above named plaintiff.

I. The defendant by protestation, not confessing or acknowledge all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to said bill. And for cause of demurrer shows:

I. That it appeareth by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed by the bill against this defendant.

II. That it doth not appear from the allegations contained in the said bill that the complainant is entitled to the relief prayed by the bill against this defendant.

III. That the said bill is exhibited against this defendant and the other defendant to said bill, for several and distinct and independent matters and causes which have no relation to each other, and in which this defendant is in no way interested or concerned and ought not to be implicated.

Wherefore, and for divers good causes of demurrer appearing on the same bill, this defendant doth demur thereto. And he prays the judgment of this honorable court whether he shall be compelled to make any answer to said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

GEORGE W. JOLLY,
City Attorney of Owensboro and
Solicitor for Defendant Reno.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

GEORGE W. JOLLY,
City Attorney of Owensboro.

DISTRICT OF KENTUCKY, *ss:*

49 Lawson Reno, being duly sworn, deposes and says he is police judge of the defendant, City of Owensboro, and that the foregoing demurrer is not interposed for delay.

LAWSON RENO.

Sworn to before me by the above named W. P. Small, this 30th day of March, A. D. 1900.

HORACE JOLLY
Examiner Daviess Co.

On the back of said demurrer is the following indorsement, to wit: Filed March 31st, 1900. Thos. Speed, clerk.

And on another day, to wit, on the 3rd day of April, 1900, there *was* issued from the clerk's office of said United States circuit court at Owensboro, a subpœna in chancery and two copies which *was* of the following words and figures, to wit:

The President of the United States of America to the City of Owensboro and Lawson Reno, judge of the police court of the city of Owensboro, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal Court hall in the city of Owensboro on the first Monday in May next, to answer a bill of equity exhibited against you in our said court, by the Owensboro Water Works Company, of Owensboro, Kentucky, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable M. W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court in Owensboro, this 3rd day of April, A. D. 1900, and in the 124 year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By DUDLEY LINDSEY,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office, on or before the 7th day of May next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk,*
[SEAL.] By DUDLEY LINDSEY,
His Deputy.

On the back of said subpœna in chancery are the following indorsements, to wit:

50 Executed the within sup. in ch'y on Lawson Reno, by delivering to him a true copy of the within to him on the 10th day of April, 1900. And also on W. P. Small, mayor of the city of

Owensboro, by delivering to him a true copy of this summons on the 10th day of April, 1900.

Att.:

A. D. JAMES,
U. S. Marshal,
By JOHN B. ROGERS,
D. U. S. M.

Returned and filed Apr. 17, 1900.

THOS. SPEED, *Clerk,*
By DUDLEY LINDSEY, *D. C.*

And on another day, to wit, on the 9th day of April, 1900, defendants filed their answer herein, which was of the following words and figures, to wit:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS CO., Complainant,
vs.
THE CITY OF OWENSBORO ET AL., Defendants.

The answer of the above named City of Owensboro to the bill of complaint of the above named complainants.

In answer to the said bill the City of Owensboro states as follows:

It denies that among any franchises or rights or privileges granted to the Owensboro Water Company, or conferred upon the complainant, was *of* the right or any right, to fix rates or prices for supplying water to private consumers thereof in said city. It denies that the defendant City of Owensboro, either by or through any of the ordinances mentioned in the bill of complaint or any contract or otherwise, ever granted or attempted to grant to the said Owensboro Water Company, or said Owensboro Water Works Company, the right, or any right, to fix the rates or prices to be charged or that might be charged consumers of water therefor furnished by said companies or either of them, and denies that any contract was made on that subject.

It denies that the ordinance entitled "An ordinance to fix
51 and regulate rates, prices and charges for water furnished to consumers in the city of Owensboro and for other purposes," approved March 19, 1900, is unreasonable or inequitable or unjust, or that if said ordinance is enforced that the entire annual revenue which it could be possible for complainant to earn under the terms and provisions of the ordinance would not amount to as much as seventeen thousand dollars, or that under the provisions of said ordinance complainant would lose of its water rentals or earnings, from 30 to 40 per centum, or lose any of its water rentals.

It denies that the actual or necessary expenses of operating its water works system, or which it is obliged to necessarily incur in carrying out any contract it has with defendant city and furnishing water to private consumers thereof is annually more than thirteen thousand dollars or as much as that sum; or that it is obliged to incur said sum or as much as said sum in the way of expenses under the most prudent of any prudent or economical administration of its water works system. It denies that the taxes assessed annually for State, county and municipal purposes, against the complainant and its property amount to from twenty-five hundred dollars to four thousand dollars or as much as twenty-five hundred dollars per annum. It denies that the natural wear and tear of complainant's machinery, pipes, hydrants, mains and other appliances amount annually *to* subjects it annually, to an expense of not less than four thousand dollars or as much as that sum. It denies that under the provisions of said ordinance, if enforced, complainant could not, under the most prudent management, or under ordinarily prudent management, earn any per cent. upon its investment, or that it would be compelled to operate its plant at an actual loss or that there would be any loss. It denies that if said ordinance is enforced it can not operate its water works plant or carry out its contracts with the City of Owensboro and the inhabitants thereof, except at a pecuniary loss to itself, or that the enforcement of said ordinance will in substance, or effect, or at all, require complainant to furnish the city or its citizens water privileges, or water protection, without compensation, or at an actual or any loss to it on the present value of its plant or otherwise, or on any basis, of seven thousand dollars, or not less than seven thousand dollars, or at any loss at all. It denies that said ordinance is for said alleged reasons, or any reason, in direct or other violation of the Constitution of the United States, of the fifth article of amendment, of fourteenth article of amendment thereof, or of the constitution of Kentucky. It denies that said ordinance im-
52 pairs the obligation of any contract between the complainant and defendant city, or that by said ordinance or its operation any property of the complainant is taken for or applied to, or can be taken or applied to, a public use, or that by the enactment or enforcement of said ordinance the complainant is deprived of any property without due process of law or otherwise or at all, or denied thereby, or at all, the equal protection of the law.

It denies that the committee appointed by the common council of the city of Owensboro did not investigate, or attempt to investigate, the subject of what would be fair rates to be charged for water furnished by the complainant to consumers of water, or that it did not fix time and place of meetings, or that it did not give complainant opportunity to present to said committee or the said common council, books or papers or to make any statement touching the proposed ordinance or the reasonableness or the unreasonableness of the rates fixed by the said ordinance. It denies that the defendant by its council did not investigate or consider the water rates at present charged by complainant, or that it did not hear or offer to hear

evidence on the subject, or that defendant city did not determine that the rates and charges by the complainant were unreasonable. It denies that the defendant city, illegally, without right, or by an *ex parte* or partisan proceeding, proceeded to pass said ordinance, without giving complainant an opportunity to be heard, and denies that the city had not power and authority to pass said ordinance or to make the rules and regulations therein, or that said ordinance is void. It denies that the rates or any of them, or the rules or any of them, fixed in said ordinance, are unjust, or unreasonable, or void, or that, if enforced, that complainant will be thereby prohibited from operating its water works system in the city of Owensboro, or that they will confiscate its property or any of it.

It denies that the introduction or passage of the said ordinance complained of in the bill was in pursuance of a fraudulent scheme, or any fraudulent scheme, or campaign policy, to which the present members of the city council committed themselves in advance of their election, or at all, or without even having investigated the subject at all, or in consummation of a scheme, or any scheme, formed by them, or others conspiring with them, to destroy or in any wise injure complainant's property, or any of it, before they were elected, or at any other time, or at all. It denies said ordinance was hurried through the council with any intention of depriv-
53 ing complainant of its property without compensation, or depriving it of a hearing before said body or with any view of depriving it of any income on its investment, or that said ordinance does deprive it of any income on its investment, or deprive it of a reasonable income on its investment, or to make it impossible for complainant to maintain or operate its system of water works in the city of Owensboro. It denies that the defendant city or any of its agents, or its mayor and common council, did not at the date of the passage of said ordinance know or enquire how much money complainant had invested in the construction of its water works system in said city; or that it did not know or investigate or attempt to find out what the necessary annual expenses of operating its system were, or the depreciation by natural wear and tear resulting to its system from constant use, or that they did not know or attempt to ascertain or fix water rates so as to give complainant a fair return upon its actual cash investment estimated upon a reasonable and fair value of its property used in *constructing* (conducting) its said water works system or carrying on its system at the time and before passing said ordinance fixing rates. It denies they did not know, or attempt to learn, or find out, the reasonable costs per annum of operating said works, or the value of its plant, or its annual depreciation resulting from wear and tear. It denies that the action of the defendant city, by or through the common council, or otherwise, in fixing the rate in the ordinance, *were* arbitrary or unreasonable or unjust or fraudulent to complainant or fraudulent at all. It denies that the motive or purpose of the common council of the defendant city in passing and having printed and distributed copies of the ordinance of March 19, 1900, or in circulating the same among the citizens of the city of

Owensboro, was with any intent or for any purpose of harassing, annoying or worrying complainant, or to encourage water consumers not to pay the water rates which will be due on the first of April, 1900, or to render it impossible for complainant to collect the water rates when due, or to comply with its contracts, or to destroy the value or injure the value of its property, or any of it.

It denies that said ordinance contains any provision or provisions that water rates can only be collected from consumers monthly, quarterly or semi-annually, but not in advance, except by the voluntary consent of the consumers. It denies that the stipulations or provisions of said ordinance are unjust, or without right or in violation of any law, or in violation of any vested right or other
54 right of complainant, either under its alleged contracts, or any contract, or under the provisions of any previous ordinance or ordinances of the defendant city, either with its alleged vendor, the Owensboro Water Company, or with complainant; and denies complainant ever acquired, directed or indirectly from the defendant city, by any ordinance or contract, any right to fix or regulate the prices or fix its own water rates, that might be charged for water sold or delivered, or agreed to be sold or delivered, to private consumers. It denies the City of Owensboro, in 1878, or at any other time, granted to the Owensboro Water Company the right to fix its rates of water rents with or for private consumers; or that said company ever established its system of water works on the faith of any grant of any right to it to fix rates for water, or on the faith that that right, or any such right, was assigned or transferred to complainant by said Owensboro Water Company, or otherwise or at all. It denies the common council has not full power and authority to regulate or control the complainant company with respect to its private consumers of water, and to prescribe terms of its contracts with them and the mode and manner in which it shall collect its water rents. It denies by the ordinances and contracts set out in the bill of complaint, or any ordinances, or contracts made by the defendant city with complainant or the Owensboro Water Company, the right to fix rates or prices to be charged for water furnished to private consumers was ever vested in complainant. It denies the complainant has invested large sums of money, or any sums of money, on the faith of such alleged right. It denies it is estopped to assert or exercise any power, control or authority to fix, establish and enforce reasonable rates for water to be furnished to private consumers thereof in said city. It denies that said ordinance complained of, if enforced, will deprive complainant of the power to earn an income on its investment, or will disable it to any extent from performing its contracts, or deprive it of its property without compensation or without due process of law. It denies that said ordinance requires complainant to submit to the judgment of the mayor of said city in respect to placing meters in all the houses of private consumers, or that this provision would subject complainant to an enormous outlay of money or any great or injurious outlay of money,

or that such expenditures would ruinously, or materially, or injuriously affect its financial interest.

It denies that the defendant city has made any threat to en-
55 force said ordinance, or to prosecute the complainant for alleged violations or infractions of it, or that it was at the time of filing said bill, or at any time, threatening to fine or imprison its employés, agents or managers. It denies that if complainant should violate the penal provisions of said ordinance, and it should be fined it would be without full, complete and ample remedy at law. It denies that if an injunction is not granted enjoining the enforcement of said ordinance the complainant will suffer great or irreparable damage or injury, or any damage or injury, and denies that the enforcement of said ordinance will cause any damage or injury to complainant.

The defendant, The City of Owensboro, further answering the complainant's bill, says that the Owensboro Water Company was organized as corporation under the general laws of the State of Kentucky, on the 9th day of September, 1878, for the purpose of building and operating in the city of Owensboro a system of water works for the supply of water pumped from the Ohio river to the said city, and the hydrants thereof.

The capital stock of this company was fixed at the sum of eighty thousand dollars, in shares of the face value of one hundred dollars each. The company, after organization, built and constructed a system of water works in the said city, consisting of pumping machinery, pipes, mains and conducts, for the purpose of supplying water to the city of Owensboro, for fire protection, and also to private consumers. They bought and erected thereon a building and pumping station on Triplett and First streets, or the river. The costs of said lot of ground, and another lot on McFarland street, and of said building and pumping station machinery, pipes, mains, hydrants and valves can not be stated precisely, but defendant says, on information and belief, that the sum was about or a little less than the sum of forty thousand dollars.

Upon completion of this work and attempt to operate it, it was discovered that mistake had been made by putting in insufficient and inadequate pumping machinery, and the machinery was to some extent remodeled and replaced with other machinery, and about the year 1882, by reason of incompetent management, one of the boilers of the engine was exploded, and expenditures were rendered necessary, and some extensions were made to their pipe system involving further outlays, aggregating probably $30,000.00; and since that time other machinery has been added, and other extensions made of their pipe system, and additional hydrants have been put
56 in, so that the total expenditures for machinery and mains and pipes have necessitated a total expenditure, including that heretofore mentioned, of approximately $110,000.00.

On September 13, 1879, the articles of incorporation were amended permitting the issue of additional stock, not to exceed $25,000.00, and this stock was permitted to be declared to be preferred, and this

stock was issued, and the stock of the company thus increased to a total sum of $105,000.00. And defendant says, on information and belief, that this sum of $105,000.00 represents the total expenditure, and more than the total expenditure, by the said company, in the purchase of real estate, and the erection of its water works system in said city of Owensboro.

Defendant says that on the first day of October, 1878, said Owensboro Water Company made a mortgage on all of its property to secure the payment of one hundred bonds of $500 each, payable twenty-five years after said date, and that on June 1, 1880, said company executed another mortgage on all of its said property to secure the payment of one hundred additional bonds of $500 each, made payable forty years after said date. And that again on October 1, 1884, said company executed another mortgage on all of its said property to secure the payment of one hundred and fifty bonds of $1,000 each, made payable twenty-five years after said date.

The defendant says, on information and belief, that of the money paid on said stock, and realized on said bonds, the only part thereof that was paid into said corporation or expended for it by the officers and stockholders thereof, who issued said stock and executed said bonds, no more than the sum of $105,000.00, was delivered to or expended for said corporation.

The complainant, The Owensboro Water Works Company, was organized as a corporation, under the general laws of the State of Kentucky, on the 13th day of May, 1889, by the stockholders and the owners of the stock, in the Owensboro Water Company, and the general nature of the business for which the complainant company was organized and proposed to be transacted by it was the acquisition of the water works of the said Owensboro Water Company, hereinbefore mentioned, and of its contracts with the city of Owensboro for it supplying the city with water for the extinguishment of fires and the privileges of supplying the inhabitants of said city with water, and to continue the maintenance and operation of said water works in the said city of Owensboro for supplying the city and its inhabitants with water for public and private purposes.

57 The capital stock of the complainant company was fixed at not less than $300,000.00, and not exceeding $500,000.00, and there has been issued three thousand five hundred and fifty shares of the face value of $100 each, and aggregating the sum of $355,000.00 of stock. And defendant says, on information and belief, that nothing was paid by the stockholders of complainant company upon their subscription for said stock; and that on the 10th day of June, 1889, the Owensboro Water Company made a deed to the complainant company, conveying to it all of the real and personal property of the said Owensboro Water Company, consisting of said two lots of ground, together with the appurtenances thereto belonging, together with all of its estate, real, personal or mixed, and all its choses in action, rights, liberties, privileges and franchises, including the franchise granted to it by the city of Owensboro, and all of its contracts with the said city, and consumers of water therein. The con-

sideration recited in said deed for the conveyance of said property is $295.000.00 in stock certificates of the complainant company, and $200,000.00 in first mortgage bonds of the said complainant company. And defendant says the stockholders at that time of the said Owensboro Water Company, and the complainant company, were the same, and there was in fact no change in the ownership of said property, and no consideration for the issue of said stock in the complainant company, and no consideration for the execution of said mortgage, and said bonds amounting to $250,000.00 issued under the mortgage, dated July 1, 1889, and the proceeds arising from the sale of said bonds were not paid into said corporation, and nothing was paid into said corporation on account of said stock, amounting to $355,000.00; said mortgage dated October 1, 1878, and said mortgage dated June 1, 1880, and said mortgage dated October 1, 1884, hereinbefore mentioned, have been paid and satisfied, and $35,000.00 of the bonds secured by the mortgage dated July 1, 1889, executed by the complainant company, amounting to $250,000.00, has been paid.

It says that said water works system is inadequate and insufficient; that the pipes are too small; that the water is not filtered; that the point at which it is pumped into the mains is in an eddy; that the sewerage from one of the large sewers of the city empties into the river only 125 feet from the suction pipe through which water is drawn from the river into the mains; that the water furnished is muddy, foul and unwholesome; that within two miles above the point at which the water is pumped into the mains there are
58 on the bank of the Ohio river two large distilleries, where large numbers of cattle are fed often, and that the cattle pens are near the river, and the filth and debris from the cattle pens and from the distilleries flows down the river and is carried by the current into the eddy from which the water is pumped into the mains; and there is a large manufacturing plant owned by the Marsden Cellulose Company and operated by it in the manufacture of cellulose and other products, and the debris and refuse are discharged into the Ohio river and very large quantities of this are carried up the river by reason of the current in said eddy to the point where the intake pipe of the complainant company are located, and much of this refuse matter is pumped into the mains and carried with the water to consumers thereof; and the pipes and mains are also permitted to become foul by the accumulation of mud and debris therein, are seldom flushed, and are more or less filled with mud and the filth carried into them by the water; and that the water is foul, unwholesome and unfit for domestic uses and purposes, and dangerous to the health of all who use it in the condition in which it is delivered to consumers thereof. Complainant has no stand pipe or reservoir, and there is no process of filtering the water, and it is pumped directly from the river into the mains and delivered thence to private consumers.

The defendant further says that the complainant company has never enforced any uniform rates for water consumption; that the

rates and prices charged by it are arbitrary, exorbitant, unreasonable, unjust and oppressive and fraudulent.

The defendant says that the income derived from the contracts with the city of Owensboro for hydrants' rental, and from private consumers in and adjacent to the city of Owensboro during the year 1889, was more than $29,000.00, and about the sum of $32,000.00; that the total expenses of operating the complainant company's water works plant for the — 1899 was less than the sum of $6,000.00. These expenditures consisted of salaries paid to its superintendent of about $1,500.00, of wages paid to its engineers, firemen, for waste, oil and other incidentals, $2,500.00, and for coal, $1,500.00, and for office expenses, consisting of clerk hire, office rent, stationery, printing, etc., $500.00. And defendant says, on information and belief, that there was expended by the complainant company for these items in the year 1899 the sum of $5,771.00 and no more; and that the total cost and expense of operation for the year 1898 *were*
59 $6,210.20 and no more; for the year 1897 the total of such cost and expense amounted to $4,208.20 and no more; and for the year 1896 the total of such costs and expense was the sum of $4,878.20. That the wear and tear incident to the operation of said water works plant and the depreciation in value thereon did not for said year 1899 exceed $2,500.00, and will not annually exceed that sum under prudent operation, and that the taxes assessed and paid by said company for the year 1899 to the State of Kentucky, county of Daviess, and the city of Owensboro, amounted only to the sum of $2,220.00.

The defendant says, upon information and belief, that if said ordinance complained of is put into full force and effect, the complainant company will receive from private consumers of water more than $17,000.00, namely, about $18,000 during the first year, and there must be added to this the sum of $7,400.00 which is being annually paid under a contract between this defendant and the complainant company on hydrant rentals, and that the income of the complainant from private consumers under this ordinance and from the city of Owensboro will amount annually to approximately $25,000.00.

Defendant says that the reduction- made by said ordinance are chiefly in favor of small consumers, and that if said ordinance is put into effect and operation, the income of the complainant from private consumers will be greatly enhanced within twelve months, and will probably at the end of one year be as great as it is now.

The defendant says that said ordinance contains no provisions prohibiting the collection of water rates from private consumers in advance, except where water meters are attached, and defendant says that there is no prohibition contained in said ordinance against the company requiring from private consumers, who have meters attached, a deposit to secure payment for the water consumed, or requiring the consumer to execute a bond to secure payment for the water furnished to the consumer, and with this single exception, all other water rentals may be collected by complainant in advance,

monthly, quarterly, semi-annually, or otherwise, according to the pleasure of the complainant company.

Defendant says that neither section nine nor ten of the ordinance, bearing date September 10, 1878, grant to the complainant any power to make reasonable rules and regulations; that the complainant had at the time of the passage of said ordinance the power to charge reasonable rates for water, and no more than reasonable rates,
60 and the said section did not enlarge the power of the complainant in that respect. And the defendant further answering, says that in the year 1896, the common council of the city of Owensboro appointed a committee to co-operate with the committee appointed by the water consumers of the city of Owensboro, for the purpose of making an investigation into the condition of the complainant company with a view of ascertaining such facts as would enable the common council to fix reasonable rates for water to private consumers thereof, and that this committee made an investigation into the condition of the complainant company, and ascertaining approximately the value of its water plant, and of the expense of operation, and on that occasion the complainant company was notified of such investigation by said joint committees, and was requested to appear before a meeting of said committees at the city hall in Owensboro, presided over by the mayor, and that Americus F. Callahan, the then president of the complainant company, appeared but refused to be sworn, and refused to disclose the original cost of the complainant's water works plant, or the amount of money expended for machinery, real estate, pipes, mains, conduits, hydrants and other property belonging to said company, and refused to disclose the amount of the gross or net income of said company, or the amount of money collected by it from private consumers of water, and refused to disclose the expense of operation, or the amount of money paid in salaries, or wages, or for coal, or office rent, or hand hire, and other expenses of operation, and in fact, refused to make any disclosures giving any items or any details relative to complainant's company's business; and refused to produce any books, or papers disclosing any of said facts, and declared that the company would make no such disclosures and would give no such information at that time, or at any other time. And for this reason the said committee of the common council, appointed in January, 1900, consisting of the mayor and five members, believed it would be useless to ask for any information from complainant company or its officers or agents.

The said company on said occasion was given every opportunity to make a full and fair statement of the matters aforesaid, and urged to do so. The present mayor of the city of Owensboro was at that time a member of the common council, and a member of said committee, and two members of the committee appointed in January, 1900, for the purpose of making a further investigation and of reporting an ordinance regulating water rates, were also mem-
61 bers of said committee; and they did make an investigation and collected such information as in their judgment enabled

them to have prepared the ordinance complained of, approved March 19, 1900.

Said ordinance was reported by the members of said committees and introduced into the common council of the city, held at the city hall in Owensboro, on Monday, March 12, 1900, and on the following day, said ordinance was published and commented upon, in the daily papers of the city of Owensboro, and defendant says that the vice-president of the complainant company, and several of its officers and agents were in Owensboro at the time, and all of them had knowledge of said ordinance, and of its introduction into and pendency before the said common council of said city, and at the time of its final passage, but neglected, failed and refused to appear before said common council or to request a hearing before said council, or said committee, or to offer any evidence, or statement or furnish any information, or make any argument or suggestion relative to said ordinance, or in opposition to it.

The defendant says that there has existed in the city of Owensboro for many years great dissatisfaction on the account of the exorbitant, unreasonable, unjust and arbitrary rates charged by the complainant company for water furnished to private consumers and on account of the fact that it is foul and unwholesome and generally unfit for domestic uses and purposes, and that said committees were appointed and investigations had, and said ordinances prepared and passed in obedience to the just demands of the consumers of water in said city.

The defendant says that the rates and prices fixed by said ordinance complained of in the bill are fair, just and reasonable, and that under these rates the complainant will be enabled to collect from water consumers of said city a sum of money which when added to the $7,449.00 payable to it by the city in quarterly installments (amounting annually to the sum of $7,440.00) will enable said company to pay all necessary and proper operating expenses of every kind and description, and to set apart a reasonable sum for depreciation, wear and tear, and pay all of its taxes and leave it a net sum of not less, approximately, than $12,000.00. That the said outstanding bonds amounting to $215,000.00 or $236,000.00, are not a valid debt against said company; that the mortgage is the result of a fraudulent combination and conspiracy on the part of the stockholders of the complainant company whereby they created this debt for their own use and benefit, and the said mortgage
62 and bonds are void. Complainant is now seeking by excessive, exorbitant, unreasonable and unjust charges for water to extort from the water consumers of the city of Owensboro large sums of money with which to pay the said alleged debt.

Besides the complainant's company there is no other water company at Owensboro, and complainant has a virtual monopoly of the business of furnishing water for public and private consumption to the city of Owensboro and the inhabitants of said city.

Wherefore, the defendant prays this honorable court to dismiss

the complainant's bill, and for a judgment against the complainant for its costs herein expended.

GEORGE W. JOLLY,
City Attorney and Solicitor for the Defendant City.

UNITED STATES OF AMERICA, *District of Kentucky,* } ss:

This affiant, W. P. Small, says that he is the duly elected and acting mayor of the defendant City of Owensboro, and that he has read the foregoing answer and knows the contents thereof, and that he believes the denials and the statements contained in said answer to be true.

(Signed) W. P. SMALL.

Sworn to before me by W. P. Small, mayor of the city of Owensboro, on this 7th day of April, A. D. 1900.

LUTHER LOVING,
Notary Public.

My commission expires March 23d, 1904.

[Seal of Notary.]

On the back of said answer is the following indorsement, to wit: Filed Apr. 9, 1900. Thomas Speed, clerk, by Dudley Lindsey, D.C.

And on another day, to wit: on the 23rd day of April, 1900, at a special term of said circuit court of the United States, district of Kentucky, Owensboro division, at Owensboro Kentucky, the following proceedings were had, to wit:

63 United States Circuit Court, District of Kentucky (Owensboro Division).

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
CITY OF OWENSBORO, ETC., Defendants. } Order.

This cause coming on to be heard upon the motion of complainant for a preliminary and interlocutory injunction, as prayed for in complainant's bill enjoining and restraining said defendants and each of them from all and any effort or pretence to enforce the alleged ordinance of March 19th, 1900 (wherein the said City of Owensboro undertook to fix and regulate the rate charged consumers of water in the city of Owensboro for domestic and other purposes), and to enjoin said city from asserting, claiming or pretending to assert that it, as a municipality, had any power, right or authority to interfere with or to regulate by ordinance or otherwise the water rates of complainant with its private consumers, and to

enjoin said city from claiming or pretending to claim that it had any right, power or authority to fix either the time when or the mode in which the complainant should collect its water rent from private consumers, and that it be enjoined from the enforcement of any one of the provisions of said ordinance, and that it be restrained from circulating among the citizens of the city of Owensboro said pretended ordinance or that it be prohibited from attempting to provide that the water consumers who have contracts with complainant should not pay their water rents in advance or that complainant should only collect its water rents monthly, quarterly or every six months, or that required it to give notice to private consumers as provided in the alleged ordinance before turning off or ceasing the flow of water to them and commanding the defendants and each of them to absolutely resist and refrain from pretending that complainant had not the right and privilege of prescribing its own rules and regulations with respect to water rents and the mode of collecting the same, and that defendants and each of them be commanded to resist and refrain from interfering in any way with complainant's rules and regulations with respect to the collection of water rents to private consumers, and that said defendants and
64 each of them be commanded to absolutely refrain from enforcing any of the provisions of said ordinance and from issuing any warrant for alleged violations thereof and from prosecuting complainant, its employés, agents or servants for any alleged violation of said ordinance, and the notice of such motion being read and filed, thereupon the complainant in support of its motion, read the affidavits of the following persons:

Frank Schefold, Alfred Walker, Dr. W. I. Thompson, J. M. Holmes, Edward Hughes, Charles Hermany, H. P. Martin, G. B. Sidelinger, Henry Stubing, Owen Ford, W. J. McGonigale, Asa Williams, J. T. Ellis, W. I. Thompson, T. B. Yager, C. C. Hooper, J. H. Taylor, R. Brannon, and certain ordinances and contracts referred to in the affidavits aforesaid.

The defendants read the affidavits of G. W. Jolly, Charles Sturtevant, Robert A. Cummins, James P. Weigal, E. B. Shifley, C. W. Bransford, Charles Broeker, and certain certified copies and certificates referred to in the affidavits.

The complainant's bill, exhibits and the defendants' answer, exhibits and the said affidavits and the exhibits referred to therein having been also read by the parties, respectively, and considered by the court, and counsel for defendants, as well as for complainant, having been heard in argument, and the motion for the said preliminary and interlocutory injunction having been considered by the court, the court filed its written opinion herein, which is now ordered to be made a part of the record herein. And in pursuance of said opinion it is hereby ordered, adjudged and decreed that a preliminary and interlocutory injunction be issued pursuant to the prayer contained in the bill of complaint herein, strictly commanding the defendant, The City of Owensboro, its officers, employés, agents and servants, until the further order of this court, from en-

forcing or attempting in any way to enforce the said ordinance of March 19th, 1900.

It is further ordered and adjudged that the defendant, The City of Owensboro, be, and it is commanded to absolutely resist and refrain, until the further order of this court, from pretending, claiming or asserting that the said ordinance or any section thereof is valid for any purpose.

It is further ordered that the defendant, The City of Owensboro, be, and it is, until the further orders of this court, absolutely enjoined from asserting, claiming or pretending to assert or claim, that it has any power, right or authority to interfere with, or
65 to regulate by ordinance or otherwise the rates of water rents to be charged by the complainant company to its private consumers.

It is further ordered by the court that the defendant, The City of Owensboro, absolutely resist and refrain from claiming or pretending to claim that it has any power or authority in virtue of its corporate existence or otherwise to fix the time when or the mode in which complainant shall collect its water rents from private consumers until the further order of this court.

It is further ordered and adjudged by the court that the defendant, The City of Owensboro, absolutely resist and refrain from the enforcement of any one of the provisions of the ordinance of March 19th, 1900, until the further order of this court.

The clerk of this court will issue the injunction as herein directed upon the execution of bond before him by the complainant company to the defendant with good security, to be approved by him, conditioned that it will pay the defendant City of Owensboro the damages it may sustain, if any, not to exceed $15,000, if it should be finally adjudged the injunction was wrongfully granted.

To all of which the defendant City of Owensboro objects and excepts.

And thereupon came the complainant, The Owensboro Water Works Company, by its counsel, and tendered its bond in the penalty of $15,000, with the Fidelity and Deposit Company of Maryland, as surety, which bond is now approved and filed. The defendant, The City of Owensboro, by counsel, prays an appeal to the United States circuit court of appeals for the sixth circuit from the judgment and orders of the court granting the interlocutory injunction herein provided for, which appeal is now allowed and granted by the court upon the condition that the said City of Owensboro execute a bond conditioned according to law with surety to be approved by the clerk in the penal sum of $500 if it is not to operate as a supersedeas, otherwise the penalty of the bond must be $15,000.

April 23, 1900.

(Signed) WALTER EVANS, *Judge.*

66 Said opinion referred to in the foregoing order is of the following words and figures, to wit:

United States Circuit Court, District of Kentucky.

OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
CITY OF OWENSBORO, ETC., Defendant. } Opinion.

The bill of complaint in this case, proceeds, among other things, upon the idea that the Owensboro Water Works Co., has, by virtue of its succession to the Owensboro Water Co., a contract with the City of Owensboro which the ordinance adopted by the city on the 19th day of March, 1900, impaired and violated. It does not seem to be necessary to determine whether that is so or not.

It is also insisted that the rates fixed by the ordinance to be charged by the complainant for the water it furnishes consumers are so unreasonably low and inadequate as practically to destroy the value of the complainant's property, and to devote it to the use of the public rather than to that of the owners, and in this way to violate the constitutional rights of the complainant.

First, in taking its property for public use without fair compensation.

Second, in depriving it of its property without due process of law.

Third, in denying it the equal protection of the law.

The Supreme Court has very clearly fixed and defined the tests by which these questions are to be determined in cases like this, and upon it as now presented by affidavits, I strongly incline to the opinion that those tests would, when applied here, render the ordinance void upon the ground that the rates it provides and fixes are unreasonably low and virtually deprive the owners of the use and benefit of their property, and, by a species of confiscation, devote it almost if not quite exclusively, to the public use, inasmuch as there would appear to be little if any chance left for the owners to obtain anything like a fair and adequate return upon their investment. It is by no means certain, however, that this impression might not be changed upon a fuller presentation of the facts. Much was said at the argument about watered stock and matters of that character, although there was no proof whatever on the subject.

But in the view we have been compelled to take of this
67 case those questions have a somewhat incidental bearing, and only serve to emphasize the necessity for the ultimate conclusion reached upon the pending motion for an injunction *pendente lite.*

If the City of Owensboro had no lawful power or authority to pass the ordinance at all, then the enforcement of it would clearly be a taking from the complainant of its right to certain property.

First, without compensation.

Second, without due process of law.

Third, without giving to it the equal protection of the law.

This makes it necessary to inquire whether the city had the statu-ary power and authority to pass the ordinance complained of.

It does not seem to be needful to inquire whether the State constitution gives the General Assembly power to delegate authority in the premises to the city. The initial proposition is, has the legislature done so in fact, whether it had the power or not? This must depend upon the proper interpretation and construction of section 3290 of the Kentucky Statutes, which for the purpose of this case, reads as follows:

"SECTION 3290. The common council of said city shall within the limitations of the constitution of the State and this act, have power by ordinance; * * * 5th, to provide the city and the inhabitants thereof with water, light, power, heat and telephone service by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the price to private consumers and customers."

It is regretted that the court of appeals of the State has not passed upon the question, but in the absence of such action, by which the court would feel itself bound, we must decide it for ourselves.

That the city is authorized to furnish water to itself and to its inhabitants by contract or by means of works of its own is apparent. What is the significance of the remaining words, namely, "to make regulations for the management thereof," etc.? That the right to make regulations for the management thereof must have the words, "works of its own," as its antecedent seems to admit of no reasonable doubt. Those words could hardly refer to the word "contract" as their antecedent, because a contract must be an agreement between two or more persons, and it would seem certain that those words must refer to the phrase "works of its own," inasmuch as it would not be possible, reasonably speaking, to allow the city alone to regulate a contract without the consent of the other party to it.

68 And so in regard to the words "fix and regulate the price thereof to private consumers and customers." They must be referred to the same antecedent, because the city alone could not, in the case of a contract, do anything of that kind. Anything of that sort must, in case of a contract, be done by stipulation between the parties, and not by the action of any one of them. It would be much too loose a construction to hold that the last clause of subsection 5 reaches out after something not even alluded to in the section, to wit, the right to fix prices charged by a private corporation which was the creature of the legislature. All that was intended that if the city had works of its own, and thereby supplied water to itself and its inhabitants, then and in that event it could fix and regulate the price to be charged private consumers as distinguished from itself.

The legislature may doubtless amend the complainant's charter and thereby itself fix or else authorize the city by ordinance to fix or regulate prices in a lawful manner, but we are clearly of opinion that the legislature has not exercised or attempted to exercise that power through section 3290.

As we now regard the matter the complainant appears to be en-

titled to an injunction *pendente lite*, and the bond will be fixed at $15,000.

(Signed) WALTER EVANS, *Judge.*

On the back of said opinion is the following indorsement, to wit: Filed Apr. 23, 1900. Thos. Speed, clerk.

Said bond referred to in the foregoing order is of the following words and figures, to wit:

Circuit Court of the United States, District of Kentucky.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY,
vs.
THE CITY OF OWENSBORO, &c.

Know all men by these presents that The Owensboro Water Works Company, of Owensboro, Kentucky, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and bound unto the City of Owensboro in the sum of fifteen
69 thousand dollars ($15,000.00), for the payment of which they hereby jointly and severally bind themselves.

The condition of this undertaking is such that whereas in the above cause the court on April 14, 1900, made an order granting an injunction *pendente lite* upon the condition that the plaintiff, The Owensboro Water Works Company of Owensboro, Ky., should give an undertaking to the defendant in the sum of $15000.00.

Now, therefore, if said The Owensboro Water Works Company of Owensboro, Ky., shall abide the decision of the court and pay any and all damages, penalties and liabilities to the said defendant in the event that they are adjudged against the said plaintiff and in favor of said defendant, then these presents shall be void, otherwise of full force.

This April 23rd, 1900.

THE OWENSBORO WATER WORKS CO.
OF OWENSBORO, KY.,
By D. LONG MILLER, *Pres't.*
FIDELITY & DEPOSIT CO., MD.,
By WILLIS MULLEN, *Gen'l Ag't & Att'y in Fact.*

[Seal of Water Co.]

[Seal of Deposit Co.]

Attest: THOS. SPEED, *Clerk.*

On the back of said bond is the following indorsement, to wit: Filed April 23, 1900. Thomas Speed, clerk, by Dudley Lindsey, D. C.

And on another day, to wit: on the 7th day of May, 1900, at rules in the clerk's office of said circuit court of the United States, district of Kentucky, at Owensboro, Kentucky, the following proceedings were had, to wit:

Rules Circuit Court U. S., Kentucky District.

MONDAY, *May 7th, A. D.* 1900.

In the Clerk's Office, before the Clerk.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY,
vs.
CITY OF OWENSBORO ET AL.

The complainant, The Owensboro Water Works Company
70 of Owensboro, Kentucky, comes and moves this honorable court to require the respondent, The City of Owensboro, to paragraph its answer filed herein to the end that the complainant may more accurately prepare exceptions thereto. And on motion of complainant the rule herein is set down for hearing on the next rule day of this court.

This day came the complainant, The Owensboro Water Works Company of Owensboro, Kentucky, and without waiving its motion to require the defendant, The City of Owensboro, to paragraph its answer, herein filed its twelve separate exceptions to the answer filed herein by the defendant, The City of Owensboro.

Said exceptions to the answer of the City of Owensboro were of the following words and figures, to wit:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY,
Complainant,
vs.
THE CITY OF OWENSBORO ET AL., Defendants.

Exceptions to the Answer of the City of Owensboro.

The complainant without waiving its motion to require the defendant, The City of Owensboro, to paragraph its answer, but insisting upon the said motion, makes the following exceptions to the answer of the City of Owensboro:

I.

For that the pretended denials of the matters alleged in the bill of complainant and found in each and every paragraph thereof, are insufficient denials and for that it doth appear from the pretended

denials contained in the said answer that they are evasive and wholly insufficient.

II.

For that the denials and each and every negative allegation contained in the said answer is not full or explicit and is evasive, specious, and insufficient.

III.

71 For that the matters in the complainant's bill alleged, to which defendant's answer is interposed is not made upon its best information, remembrance, belief, and knowledge, but is sham, disingenious, evasive and insufficient.

IV.

That each and all of the answer of the defendant, The City of Owensboro filed herein, to the matters to which the same are addressed are insufficient, sham, and evasive. That the denials contained and purported to be made by said defendant in its answer to the complainant's bill are irrelevant, insufficient, and present no defense to complainant's bill and they are untrue.

V.

That that part of the denial contained in defendant's answer to complainant's bill wherein it is attempted to be denied that the defendant never granted or attempted to grant to complainant or its predecessor any right to fix the rates or prices to be charged or that might be charged consumers of water therefor furnished by said companies or either of them, and which attempts to deny that any contract was made on that subject, is insufficient, irrelevant, and untrue, as shown by other portions of said answer is wholly insufficient.

VI.

That that part of the denial contained in the answer, to wit: "It denies that the ordinance entitled, 'An ordinance to fix and regulate the rates and prices charged for water furnished to the consumers in the city of Owensboro, and for other purposes,' approved March 19th, 1900, is unreasonable, inequitable, or unjust, or that if said ordinance is enforced the entire revenue it would be possible for complainant to earn under the terms and provisions of the ordinance would not amount to as much as $17000, or that under the provisions of said ordinance complainant would lose of its water rentals or earnings from thirty to forty per centum or lose any of its water rentals," is irrelevant, immaterial and insufficient.

VII.

For that the pretended denials contained in the defendant's answer beginning with the words: "It denies that if said ordi-
72 nance is enforced it can not operate its water works plant, &c.," on page 2 thereof, down to and including the words: "the equal protection of the laws," on page 3 of the answer.

Also to the following denials beginning with the words: "It denies that the committee appointed by the common council of the city of Owensboro did not investigate, &c.," on page 3 of the answer, down to and including the words: "And denies that the enforcement of said ordinance will cause any damage or injury to complainant," on page 7, because the denials embraced in that part of the answer above quoted from and referred to are irrelevant, immaterial and wholly insufficient.

VIII.

Complainant further excepts to each and every denial contained in the answer beginning on page 1 thereof, down to and including page 7, for the reason that each and all of the denials in the answer of the defendant, The City of Owensboro, in so far as they attempt to traverse or deny the allegations of the bill are irrelevant, immaterial, insufficient, and are mere conclusions and moreover because the allegations of the bill attempted to be traversed by the answer are, as matter of law, arising on the facts admitted by the answer not traversable.

IX.

For that the affirmative allegations contained in the answer, beginning on page 8 thereof, down to and including the words: "Besides the complainant's company, there is no other water company at Owensboro, and the complainant has a virtual monopoly of the business of furnishing water for the public and private consumption to the city of Owensboro and the inhabitants of said city," are impertinent, irrelevant, immaterial and not responsive to the allegations of the bill and present no defense to the allegations contained in complainant's bill and are wholly insufficient in law.

X.

That that part of the answer of the defendant, City of Owensboro (the answer not being paragraphed) beginning on page 8, with the words: "The defendant, The City of Owensboro, further answering the complainant's bill, says: That the Owensboro Water Company was organized as a corporation under the general laws of the State
of Kentucky, &c.," down to and including the words: "ap-
73 proximately $110,000," on page 9 of the answer; that that part of the answer beginning with the words: "On September 13th, 1879," on page 9, down to and including the words: "$250,000, has been paid," on page 11, of the answer; that that part

of the answer beginning with the words: "It says that said water works system is inadequate, &c.," on page 11 of the answer down to and including the words: "into the mains and delivered thence to private consumers," on page 12 of the answer; that that part of the answer beginning with the words: "The defendant further says that the complainant company has never enforced any uniform rates for water consumption, &c.," on page 12 of the answer down to and including the words: "approximately $25,000," on page 13 thereof; that that part of the answer beginning with the words: "Defendant says that the reductions made by said ordinance are chiefly in favor of small consumers," beginning on page 13 of the answer, down to and including the words: "according to the pleasure of the complainant company," on page 14, because the allegations in the answer above quoted and referred to are immaterial, not responsive to the allegations of the bill and are wholly insufficient and impertinent.

XI.

That that part of the answer (same not being paragraphed) beginning with the words: "Defendant says that neither section 9 or 10 of the ordinance bearing date September 10th, 1878," on page 14, down to and including the words: "approved March 19th, 1900," on page 16, and for that the pretended allegations and each and every part thereof and the pretended matters therein attempted to be set out are impertinent, irrelevant, and immaterial and contain no defense to the allegations contained in complainant's bill and are insufficient.

XII.

For that the affirmative allegations contained in the answer beginning with the words: "The said ordinance was reported by the members of said committee and introduced into the common council of the city held at the city hall in Owensboro, Monday, March 12th, 1900," on page 16, of the answer, down to and including the words: "and the inhabitants of said city," on page 17 thereof, are impertinent, irrelevant and immaterial and contained no defense to complainant's allegations and are insufficient, and because the same are sham, untrue and evasive of the issue presented by said bill and are insufficient.

74 Complainant excepts to each and every part of the answer, both that part of which pretends to traverse the allegations of complainant's bill and that part of it which attempts to plead affirmative matter, for the reasons hereinbefore set out and for the further reason that the allegations contained in the answer both negative and affirmative, are not good or sufficient in law, and because they do not deny the substance of the allegations contained in the bill and are insufficient.

Complainant asks that it may be allowed hereafter, if necessary to amend its exceptions herein when the answer is paragraphed.

Wherefore, the complainant, The Owensboro Water Works Com-

pany, of Owensboro, Kentucky, comes and in all particulars aforesaid excepts to the answer of the defendant, The City of Owensboro, on the grounds alleged in the preceding exceptions, that the same is evasive, imperfect, insufficient, irrelevant, impertinent, not responsive to the allegations of the bill, and because the said answer upon the law arising on the facts stated in the bill and admitted in the answer present no defense whatever.

And complainant humbly prays that the answer of the defendant, The City of Owensboro be held to be insufficient for any purpose, that the whole thereof be stricken out at the costs of the defendant, because presenting no defense, and that the complainant, The Owensboro Water Company, of Owensboro, Kentucky, be adjudged its costs about the exceptions expended and that it have such other relief in the premises as to this honorable court may seem just and proper.

BINGHAM & DAVIES AND
SWEENEY, ELLIS & SWEENEY,
Solicitors for Complainant.

On the back of said exceptions is the following indorsement, to wit: Filed May 7, 1900. Thomas Speed, clerk. By Dudley Lindsey, D. C.

75 And on another day, to wit, on the 4th day of June, 1900, at the June term of said circuit court of the United States at Owensboro, Kentucky, the Honorable Walter Evans, district judge, presiding, the following proceedings were had, to wit:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division.

MONDAY, *June 4th, A. D.* 1900.

OWENSBORO WATER WORKS COMPANY
vs.
CITY OF OWENSBORO, &C.

This cause coming on to be heard on the demurrer of the defendant, Lawson Reno, to the bill of complaint and on the exceptions of the complainant to the answer of the defendant, City of Owensboro, and the court having considered the questions arising on said demurrer and exceptions and being now sufficiently advised it is adjudged decreed and ordered that the demurrer of the said defendant Reno be and the same is sustained to the bill of complaint, and the defendant Reno recover of the complainant his costs in this cause expended; and it is further adjudged, ordered and decreed that the exceptions of the complainant to the answer of the defendant be and the same are each and all overruled.

On the motion of the complainant the injunction herein granted

is continued pending this cause to which defendant excepts; and on motion of the defendant, The City of Owensboro, leave is granted to the said city to apply to Honorable Horace H. Lurton, United States circuit judge, for a dissolution of the injunction herein on the record pleadings and affidavits now in the record on or before the first day of August, 1900, but ten days' notice of such application shall be given to complainant or its counsel.

76 And on another day, to wit, on the 2nd day of July, 1900, in the clerk's office of said circuit court of the United States at Owensboro, Kentucky, the following proceedings were had, to wit:

Rules Circuit Court U. S., Kentucky District.

MONDAY, *July 2nd*, 1900.

In the Clerk's Office, before the Clerk.

OWENSBORO WATER WORKS CO. OF OWENSBORO, KY.,
vs.
CITY OF OWENSBORO, KENTUCKY.

This day came the complainant by its attorney and filed its replication to the answer herein.

Said replication was of the following words and figures, to wit:

Circuit Court of the United States, District of Kentucky (Owensboro Division).

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO and LAWSON RENO, Judge of the Police Court of the City of Owensboro, Defendants.

Replication to Answer.

To the honorable the judges of the circuit court of the United States in and for the district of Kentucky:

May it please your honors:

This replicant, The Owensboro Water Works Company, of Owensboro, Kentucky, reserving to itself all and all manner of advantages of exception which may be made and taken to the manifold
77 errors, uncertainties and insufficiencies of the answer of the defendants, The City of Owensboro, *et al.*, for replication thereunto sayeth, that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto

by this replicant; without that, that any other matter or thing in the sentence contained, material or effectual in the law to be replied unto, and not herein well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove, that this honorable court shall direct, and prays as in and by its said bill, it has already prayed.

BINGHAM & DAVIES AND
SWEENEY, ELLIS & SWEENEY,
Counsel for Complainant.

J. T. Ellis, says he is vice president of complainant company, and he is its chief officers and agent in this county and State, and he believes the statements in the foregoing replication to defendant's answer, are true.

J. T. ELLIS.

Subscribed and sworn to before me by J. T. Ellis, this the 10th day of April, 1900.

[SEAL.] (Signed) W. H. OWEN,
Notary Public.

My commission expires Jan. 10, 1902.

On the back of said replication is the following indorsement, to wit: Filed at rules July 2, 1900. Thos. Speed, clerk. By Dudley Lindsey, D. C.

And on another day, to wit, on the 11th day of August, 1900, there was filed in the clerk's office of said United States circuit court at Owensboro, Kentucky, an agreement in writing, which is of the following words and figures, to wit:

78 In the Circuit Court of the United States, District of Kentucky.

THE OWENSBORO WATER WORKS COMPANY }
vs. }
THE CITY OF OWENSBORO. }

It is agreed by the parties to the above entitled cause that the time for the taking of testimony in the cause shall be enlarged and extended until the twentieth day of December, 1900.

It is further agreed that the depositions in the cause shall be taken at Owensboro, Kentucky, in the office of the clerk of the United States courts, or in some adjoining room in said building, except as the parties may agree that a deposition or depositions may be taken elsewhere.

At least one day's notice shall be given to the counsel for the opposite party, and notice to either of the several counsel for the complainant shall be deemed sufficient.

The depositions shall be taken in shorthand and written out in typewriting, the signatures of the witnesses to their depositions are waived.

If it should be impracticable to take the deposition- of any witnesses at Owensboro as above specified, then, upon three days' notice to the opposite party, the deposition or depositions of such witness may be taken at Louisville, Kentucky.

If it should be impracticable to take the deposition of any witness at either Owensboro or Louisville, such deposition shall be taken on interrogatories, notice of which and copies of which shall be served on opposite counsel five days in advance of the taking of such deposition.

Given under my hand this 11 day of August, 1900.

BINGHAM & DAVIES,
Counsel for Owensboro Water Works Co.
CITY OF OWENSBORO, KY.,
By GEO. W. JOLLY, *City Attorney.*

On the back of said agreement is the following indorsement, to wit: Filed Aug. 11. Thos. Speed, clerk. By Dudley Lindsey, D. C.

And on another day, to wit, on the 24th day of November, 1900, there was an opinion rendered by Judge Lurton, circuit judge,
79 on the motion to dissolve the temporary injunctions granted in this case and in the case of Owensboro Gas Light Company *v.* City of Owensboro, Ky., which was of the following words and figures, to wit:

OWENSBORO WATER WORKS CO.
vs.
CITY OF OWENSBORO, KY.,

and

OWENSBORO GAS LIGHT CO.
vs.
CITY OF OWENSBORO, KY.

Before Lurton, circuit judge.

In each of these cases, Judge Evans, upon a full hearing on the bills and answers, affidavits and counter affidavits granted temporary injunctions restraining the city of Owensboro from enforcing certain ordinances of the city of Owensboro fixing a schedule of charges to be made by the complainant companies to their customers and regulating the mode of collecting such charges.

The bills attack the validity of these ordinances as in excess of the power of the corporation of Owensboro, as violative of the contract rights and charter franchises of the complainant companies and as an unreasonable and arbitrary adjustment of the rates to be charged consumers destructive of the property and contract rights of complainants.

Motions have been made before by the defendant in each case to dissolve the injunction so allowed, Judge Evans having granted permission to apply to me for a dissolution. The hearing has been made upon precisely the same record upon which Judge Evans granted the injunction.

The questions presented are serious and doubtful. Their solution depends upon questions of law and fact to be ultimately determined. The preliminary injunctions simply preserves the status of the parties until a final hearing. The injury to complainant will be immed-ate, certain and grave if the injunction shall be dissolved. Upon a balance of inconveniences and damages the remedy of consumers for an unlawful overcharge will be comparatively certain and
80 easy of calculation and adjustment compared to the losses which would be sustained by complainants if the injunction should be wrongfully dissolved. City of Newton *v.* Lewis, 25 C. C. A. 161. Unless the urgency be great and the mistake most evident a preliminary injunction allowed by one judge should not be set aside or modified by another, where the hearing in both instances be upon the same record. Klein *v.* Fleetford, 35 F. R. 98; Westerly Water Works *v.* Town of Westerly, 77 F. R. 783. In Shinkle, *et al.*, *v.* Louisville and Nashville R. R. Co., 62 F. R. 690, I entertained a motion for the dissolution of a restraining order made before answer and without notice and upon leave granted to apply to me for a dissolution upon a hearing. Under such circumstances I treated the application for a dissolution as if an original motion for an injunction unaffected by the order theretofore made. The situation of the present case is altogether different, and I ought not to interfere except upon a clear case.

The motion is therefore denied in both cases.

Nov. 24, 1900.

(Signed) HORACE H. LURTON,
Circuit Judge.

On the back of said opinion is the following indorsement, to wit: Filed November 24, 1900. Thos. Speed, clerk. By Dudley Lindsey, D. C.

And on another day, to wit, on the 28th day of November, 1900, there *was* filed in the clerk's office of said circuit court of the United States at Owensboro, Kentucky, the depositions of George B. Sidelinger, Edward Hughes, William J. McGonigale and George J. Long, taken on behalf of complainant: which were of the following words and figures, to wit:

In the Circuit Court of the United States, District of Kentucky, Owensboro Division.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO and Others, Defendants.

The deposition of George B. Sidelinger, taken, pursuant to
81 notice attached hereto, at the office of Mess. Bingham and Davies, Louisville Trust building (corner 5th and Market streets), Louisville, Kentucky, Thursday, November 15th, 1900, at 10 o'clock a. m., to be used and read on behalf of the complainant on the trial of the above styled case.

The witness, GEORGE B. SIDELINGER, being first duly sworn, and being examined by Mr. Bingham, of counsel for complainant, testified as follows:

Q. 1. Will you please state your name, age and occupation?
A. George B. Sidelinger; age 53; superintendent of water works.
Q. 2. Your residence?
A. Danville, Illinois.
Q. 3. Are you superintendent of the water works at Danville, Illinois?
A. I am.
Q. 4. How long have you occupied that position?
A. Eight years this month.
Q. 5. Have you had during that time and previous to that experience in the construction, operation and management of water works?
A. Yes, sir.
Q. 6. Please state what your experience in this respect has been?
A. I have been superintendent of the water works in Kansas City, Kansas; I have been superintendent of the Hydraulic Company, Grand Rapids, Michigan; I have worked on several water works in laying pipe and erecting water works in Mass.
Q. 7. Are you familiar with the prices charged for water works material, pipes, hydrants and the labor for laying same, etc.?
A. I am quite familiar with them.
Q. 8. Have you ever had any practical experience in laying water works pipes?
A. Yes, sir.
Q. 9. Have you since the commencement of this action examined the water works and pipe system owned by the complainant, The Owensboro Water Works Company, of Owensboro, Kentucky?
A. I have been there, yes, sir, and looked them over.
Q. 10. Can you state at what time you made this examination?
A. Yes, sir; about the 2nd or 3rd of April.
Q. 11. In what year?

82 A. This year.

Q. 12. Will you please state what in your judgment was the condition of the system operated by this company, the condition of its machinery, plant and whether or not the company furnishes sufficient fire protection and has sufficient quantity of water for domestic purposes for the city of Owensboro?

A. I looked over the plant while I was there and found it in good condition; I found a good deal more pumping capacity than I thought necessary for a city of that size, which necessarily gives good fire protection, I think.

Q. 13. What, in your judgment, would be the sum required to replace or duplicate the system of water works now operated by the Owensboro Water Works Company?

A. Two hundred and thirty-five or two hundred and fifty thousand dollars, along there somewhere; I can not tell exactly.

Q. 14. Is this your judgment made on a careful and accurate examination of the plant with view to finding out what the actual value is?

A. Yes, sir; I figured it over there while there.

Q. 15. In your judgment, has it cost the present company as much as $245,000, $250,000 or more to build the present plant at the city of Owensboro?

Objected to by Mr. Jolly, counsel for City of Owensboro.

A. I should think it had.

Counsel for City of Owensboro excepts to answer.

Q. 16. Are you sufficiently familiar with the operation of water works machinery to form an opinion as to the amount of money necessary to account for the wear and tear on such machinery in actual operation?

A. I know what it costs me.

Q. 17. In your opinion, what would be a reasonable allowance for keeping the plant at Owensboro in its present good condition?

Objected to by counsel for City of Owensboro.

A. Two and a half to three per cent.

Counsel for City of Owensboro excepts to answer.

Q. 18. Are you familiar with the rules and regulations adopted by water works companies in regard to the collection of their water rents?

A. Yes, sir, as far as their books of regulations show me, I have quantities of those.

Q. 19. What is the custom among water works companies in regard to the collection of their rates?

Objected to by counsel for City of Owensboro.

83 A. They collect in advance.

Counsel for City of Owensboro excepts to answer.

Q. 20. What, in your judgment, would be the result if rates were not collected in advance?

A. I don't see how the company could run without collecting the rates in advance.

Q. 21. What, in your judgment, would be the loss to a water company from failure to collect its rates in advance?

Objected to by counsel for City of Owensboro.

A. From one-half to sixty per cent., I suppose, thirty to sixty per cent.

Counsel for City of Owensboro excepts to answer.

Q. 22. Have you read the ordinance of the city of Owensboro, which is sought to be enjoined in this action?

A. Yes, sir, I have.

Q. 23. What effect would this ordinance have upon the Owensboro Water Works Company if put into effect and the company operated under its provisions?

A. I think it would ruin it.

Q. 24. In your judgment what amount of money would be required for the actual operation of the Owensboro Water Works Company apart from any interest on the investment or taxes?

A. Apart from the interest on its investment?

Q. 25. The actual running expenses?

A. Ten or twelve thousand dollars.

Q. 26. Would it be possible for the Owensboro Water Works Company to earn its running expenses and any interest on its investment under the ordinance complained of in this action?

A. I don't think it would.

Q. 27. Are you familiar with the number of consumers which the Owensboro Water Works Company has in the city of Owensboro, and of the income it annually receives from them and from hydrant rental to the defendant city?

A. I have got it down, but I don't remember just now, from the last testimony I made, I can look it up. I don't remember just the amount of the consumers.

The witness was instructed by counsel for complainant to take his affidavit heretofore filed in this case and refresh his memory from it, to which the counsel for the City of Owensboro objected.

A. It don't say in this, does it? I have forgotten how many consumers there were.

Q. 28. Mr. Sidelinger, I believe you stated you had examined the ordinance which the complainant seeks in this suit to enjoin?

84 A. Yes, sir; I have looked it over.

Q. 29. In your judgment would it be possible for the

Owensboro Water Works Company or any other company to operate its plant and make a reasonable profit on its investment under that ordinance?

A. I don't think it would. I think it could not.

Q. 30. What are your reasons for that statement?

A. Too low prices.

Q. 31. I believe you stated heretofore that the failure to collect water rents in advance as provided in the ordinance complained of in this action, would cause a large loss to the company?

A. Yes, sir.

Q. 32. Taking this feature in connection with the low rates provided in the said ordinance, would it be possible for the Owensboro Water Works Company to obtain a reasonable profit on its investment, if operated under the ordinance complained of?

A. I think not.

Cross-examination by GEORGE W. JOLLY, attorney for City of Owensboro:

Q. 33. Mr. Sidelinger, you say you are in the employ of the Danville Water Company, at Danville, Illinois?

A. Yes, sir.

Q. 34. Who is the owner of that company, the stockholders?

Objected to by counsel for complainant.

Q. 35. Is it not owned by the same people substantially that own the Owensboro Water Works Company?

Objected to by counsel for complainant.

A. I don't know.

Q. 36. Isn't that your information?

A. I don't know.

Q. 37. I am asking you if that isn't your information?

A. I think there are some of the stockholders that own stock in the Danville Water Company.

Q. 38. Do you know who built that water plant out there?

A. Out where?

Q. 39. Danville, Illinois?

A. Dennis Long.

Q. 40. Of Louisville, Kentucky?

A. Yes, sir.

Q. 41. Dennis Long was the father-in-law of Samuel Miller, wasn't he?

A. Yes, sir.

Q. 42. And he is the grandfather of Dennis Long Miller?

85 A. I think so, yes, sir.

Counsel for complainant objects and excepts to all the above questions and answers.

Q. 43. Isn't it your information that the controlling interest in the Danville Water Company is owned by the same people who own the controlling interest in the Owensboro Water Works Company?

A. I don't know that.

Q. 44. Isn't that your information?

A. No, sir, I have not any information as to that.

Q. 45. Who is the president of that company?

A. George J. Long.

Q. 46. Who is George J. Long?

A. George J. Long is a resident of Louisville.

Q. 47. What relation is he of Dennis Long?

A. Son, I think.

Q. 48. Who is secretary of that company—of the Danville Water Company?

A. William J. McGonigale.

Q. 49. Who is Mr. McGonigale?

A. Well, sir, I am unable to tell you, except he is our secretary.

Q. 50. Where does he live?

A. He lives here.

Q. 51. In Louisville?

A. Yes, sir.

Q. 52. What relation is he of Dennis Long?

A. I don't know.

Q. 53. Mr. Dennis Long is now dead?

A. Yes, sir. I don't know that he is any relation to him.

Q. 54. How long did you say you had been in the employ of the Danville Water Company?

A. About eight years.

Q. 55. Not eighteen years?

A. No, sir, I have been in the business eighteen years.

Q. 56. How often have you been in Owensboro?

A. Once.

Q. 57. When was that?

A. Last spring.

Q. 58. And you went there to make an affidavit on the hearing for an application for injunction in this case?

A. Yes, sir.

Q. 59. You say you examined their property?

A. Yes, sir.

Q. 60. How much real estate do they own?

A. I can not tell without refreshing my memory from figures.

86 Q. 61. Do you know what it is worth?

A. I don't remember now.

Q. 62. Do you know anything of their pipe system?

A. Only what I have seen laid in the streets, that is in walking over them.

Q. 63. Have they any 24 inch pipe in their pipe system?

A. I have forgotten.

Q. 64. Have they any 20 inch pipe in their system?

A. I think they have, yes, sir.

Q. 65. How many feet?

A. I can not remember.

Q. 66. Where is that placed in the system?

A. It is the suction pipe, I think.

Q. 67. How far is the pumping station from the Ohio river, about?

A. Oh, I guess 100 feet or 150 feet, somewhere along there.

Q. 68. Is the suction pipe from the river up to the pumping station?

A. I think so—I think there is more of it, although I am not able to say. I can not answer that.

Q. 69. Well, from your examination, can you say whether there is as much as 500 feet of it?

A. I should think likely there was.

Q. 70. Probably about that?

A. Yes.

Q. 71. How many feet, if any, have they of 18 inch pipe?

A. I can not remember, Mr. Jolly, without calling over figures.

Q. 72. Isn't it a fact they haven't any?

A. I don't remember.

Q. 73. Do you remember about 16 inch pipe—how much they have?

A. No, I don't remember about the size of the pipe off-hand.

Q. 74. I will ask you this, then: Mr. Sidelinger, isn't it a fact they have no pipe in their distribution system that is for distributing water, above twelve inches in diameter?

A. I don't remember.

Q. 75. Do you remember how many feet they have of twelve inch pipe?

A. No.

Q. 76. Do you know how many feet they have of ten inch pipe?

A. No.

87 Q. 77. Of eight inch pipe?

A. Not now.

Q. 78. How many feet have they of six inch pipe?

A. No, sir, not without looking over my figures.

Q. 79. Do you know how many of four inch pipe they have?

A. I will have to give same answer.

Q. 80. Of three inch pipe?

A. No.

Q. 81. Let me see if I can refresh your memory. Isn't it a fact they have approximately 5,600 feet of twelve inch pipe?

A. I can not say as to the pipe without giving my figures.

Q. 82. Well, of course, I can only ask you to testify from your memory.

A. Well, that I can not do. I have taken the figures from the map and been over the lands and would have to figure from that. I do not carry the figures of my own system in my mind.

Q. 83. Isn't it a fact they have only 300 feet of ten inch pipe?

A. I don't know.

Q. 84. And 10,570 feet of eight inch pipe?

A. No, sir, I can not answer.

Q. 85. And that they have about 11 miles and 38-100 of mile of six inch pipe, or approximately 60,000 feet?

A. I can not answer.

Q. 86. And that they have 28,000 feet of four inch pipe?

A. I don't know.

Q. 87. And 1300 feet of three inch pipe?

A. I don't know, sir.

Mr. BINGHAM, for complainant: Mr. Jolly, I object to all those questions.

Mr. JOLLY: I am asking if that is a fact, and he says he don't remember or don't know, whichever he did say.

Q. 88. Well, please state what the Owensboro water works plant and property consist of as fully as you can?

A. Well, its land, station, its pumping engines, boilers and general machinery, pipes, valves, specials, hydrants, meters, corporation and stop cocks, service pipes, tools, etc.

Q. 89. You have heretofore stated on your direct examination that you estimated the value of the Owensboro water works plant to be $235,000 to $250,000. Now, I will be obliged if you will give the details with separate valuations so that we can see precisely how you value these different parts of their property?

88 A. I can not do it, Mr. Jolly, without stepping off and going into figuring again—figure the thing over again.

Q. 90. Are you a graduate of any school of civil engineering?

A. No, sir.

Q. 91. Have you had any technical training?

A. No.

Q. 92. What is your particular business at this time?

A. Superintendent.

Q. 93. What are your duties as superintendent?

A. Everything that pertains to water works from one end to the other.

Q. 94. You superintend the operation of the plant system?

A. Superintend the operation of the plant system, lay all my own pipes, do all my own work; if there is anything the matter with the pipes, I repair them myself, except going into the machine shops—I can build an engine from one end to the other; I can make models and go into the foundry and cast them, or go into the machine shop and build it if necessary.

Q. 95. What has been your trade, were you a machinist?

A. I was a machinist, shipsmith and millman; general machinist.

Q. 96. I shall have to ask you, Mr. Sidelinger, to make some calculations now. You have been at Owensboro and you are acquainted with the condition of the ground there—Owensboro is situated, is it not, on a sandy plain on the banks of the Ohio river——

A. On a sandy loam.

Q. 97. Assuming that the Owensboro water works plant has approximately 5,600 feet of 12 inch pipe laid in its pipe system there, and 300 feet of ten inch pipe and 10,570 feet of eight inch pipe, and 60,100 feet of six inch pipe, and 28,075 feet of four inch pipe, and 1300 feet of three inch pipe, and 200 feet of two inch pipe, state now what was the cost of putting that pipe in the system, say twenty years ago, at the then prevailing prices of labor and pipe and material, and then what it would cost to-day to put that much pipe in the system at Owensboro? And that they have also 160 hydrants and about 160 valve boxes, 184 water meters, 1200 water taps, you saw their brick house there, pumping station; you know its dimensions, state its value, and describe the engines they have and the size of them and the value of them approximately, and then the size of the boilers and the approximate cost of them, and they have
89 two lots of land at Owensboro—now, then, take those figures and make an estimate as nearly as you can of the value of that property—what it cost, originally, if you can form an idea of it, and if you can not, state what, at present prices of material, it would cost to duplicate the system?

Counsel for complainant objects.

A. In order to answer that question I would have to measure it up again and get at the whole thing again and get the prices of material as it is now. I don't remember from that day to this what I had the figures then. At that time I figured it up, but I don't remember now.

Q. 97. Have you ever as engineer or contractor constructed a water plant?

A. I never have contracted for one; I have been foreman on several.

Q. 98. Where and when?

A. I have worked on one at the city of Needham, Mass.

Q. 99. When was that?

A. That was about ten years ago.

Q. 100. How long did you work there?

A. Oh, fifty or sixty days, I think, somewhere along there.

Q. 101. Well, where else?

A. Avon, Mass.

Q. 102. How long there and when?

A. Two or three months, somewhere along about that. I don't just remember; a couple of months, I guess; while they were laying the pipes.

Q. 103. And where else?

A. At Grand Rapids, Mich., and Wyandotte, Kansas, and my own plant up here, the one I am superintendent of.

Q. 104. How long in Michigan?

A. I was superintendent there about a year and a half or two years, and I sold out.

Q. 105. Do you own any stock in Danville Water Works Company?

A. No, sir.

Q. 106. In the Owensboro plant?

A. No, sir.

Q. 107. You don't hold any bonds in either plant?

A. No, sir.

Q. 108. What is the size of the city of Danville, what is its population?

A. The last census has not been given out.

Q. 106. Approximately you can state it?

A. I guess about eighteen or twenty thousand people.

90 Q. 107. What is the extent of the pipe system in the Danville water works?

A. You mean in miles?

Q. 108. Yes.

A. About twenty-seven (27) miles.

Q. 109. From what point is the Danville water works managed, from Louisville?

Objected to by counsel for complainant.

A. The president is in Louisville.

Excepted to by counsel for complainant.

Q. 110. You get your orders from Louisville, do you not?

Objected to by counsel for complainant.

A. Yes, sir.

Counsel for complainat excepts to answer.

Q. 111. Unless there is some personal objection to answering this question, state what salary you receive?

Objected to by counsel for complainant.

A. That is personal; I don't care to tell my salary and my business; I don't think that is right.

Counsel for complainant excepts to answer.

Q. 112. Please state the amount of salary you receive?

Counsel for complainant objects to the question as wholly irrelevant to this case.

A. I decline to answer; I think that is a private affair of my own.

Q. 113. I wish you would explain what you mean by the wear and tear, do you mean when you say it would be annually two and a half to three per cent., that the property would depreciate that much per annum?

A. I think so in the deterioration of the pipes and rusting of pipes and wear and tear on boilers and machines.

Q. 114. The wear and tear on boilers and machinery, it seems might be much more than it is on pipes?

A. Well, it is somewhat.

Q. 115. And the rusting, etc., may depend upon the character of the soil in which pipes were laid?

A. I don't know that the soil has much to do with it.

Q. 116. Do you know when the Owensboro water plant was originally built?

A. No, sir; about twenty years ago, I think.

Q. 117. Do you mean to say then the Owensboro water works plant is to-day worth 2½ per cent. per annum for twenty years or three per cent. per annum for twenty years less than its original cost?

A. No, I don't know that it is worth entirely that much less, but on machinery it takes about that much to keep it up; that
91 is to keep the thing up, that is keeping the thing in good shape.

Q. 118. It is impossible to keep the pipes from rusting, and impossible to keep machinery from wearing?

A. Yes, but you can put them in shape all right, practically as good as new, you can put them back into shape, with lots of labor to it.

Q. 119. Then do I understand you to mean that if you would take a water works system that cost $100,000, for example, and use it twenty years, that the natural depreciation of the property in that time would be at 2½ per cent., that would be $50,000, wouldn't it?

A. About that.

Q. 120. About that; is two and a half per cent. a low or a high estimate?

A. Well, it is none too low. It has been costing me about that to keep my plant running in shape. I figure from that. Of course different places and different conditions and different things have different effects.

Q. 121. Now, Mr. Sidelinger, did you make in your estimate of the value of that property when you placed it at $235,000 to $250,000, did you estimate anything for the value of the franchise?

A. No, sir, didn't know anything about the franchise.

Q. 122. What did you estimate the real estate at?

A. I don't remember; I don't think I estimated the real estate.

Q. 123. Are you able to state the average cost per foot of laying four inch water pipe?

A. What do you call "laying," Mr. Jolly?

Q. 124. Well, take a pipe four inches in diameter, twelve inches long, weighing twenty pounds lineal foot, estimated at $30 per ton, now take the cost of the lead and the hemp packing and the excavation and the temping and refilling and the total cost of every description, valuing it all per foot, can you state what it is?

A. Well, different places, different prices; it costs me for digging trenches, lead, yard and labor, regardless of the cost of the pipe, that would have to be added to it, about 25 to 30c. in one town——

Q. 125. I have here a table prepared by Mr. Wm. B. Rider, civil engineer of the State board of engineers, and member of the American Water Works Association, etc., of S. Norwalk, Conn., in which he states that the average price from actual experience in the construction of water pipes in thirty different States to be 45c. per foot four inch pipe?

A. Do you mean pipe and all?

92 Q. 126. Including pipe and everything.

A. That is low enough.

Q. 127. That is estimating the pipe at $30 per ton?

A. The price of pipe per ton, that varies.

Q. 128. What is the present price of pipe per ton?

A. I don't know.

Q. 129. And he states the cost of laying the six inch pipe at 65c., 8 inch pipe 95c, 10 inch pipe, $1.25, 12 inch pipe, $1.55; isn't that approximately correct?

A. It might be in some places.

Q. 130. Well, take thirty different cities, New England cities, at that, where they have stone to cut through, blast rock, and then take a sandy loam like that at Owensboro, wouldn't it be less than the average cost of thirty New England cities?

A. Well, it costs about as much to dig dirt in one place as another, except sometimes you strike hard pans, etc.

Q. 131. Now, from your recollection of the lot of ground they have at Owensboro, and from what figures, if any, you made there of the valuation of real estate situated at the point where the Owensboro water works owns this real estate, would you consider $2,000 or $2500 a fair price for it?

A. It is right in the heart of the city.

Q. 132. I beg pardon, it is not.

A. It is right on the river edge, and river edge property is supposed to be as valuable as any, isn't it. I don't know exactly, I know taking cities like Boston or Chicago river edge property is more valuable?

Q. 133. Isn't it a fact that $2,000 is a fair value for all the real estate they have there?

A. No, I think it is worth more than that.

Q. 134. $2500?

A. I can not say without looking it over again.

Q. 135. Did you make any inquiry of real estate agents in Owensboro as to the value of the property?

A. No, I didn't.

Q. 136. Where did you get your information?

A. From what it cost.

Q. 137. Where did you get that information from?

A. Worked it up there from the books, etc.

Q. 138. You were brought to Owensboro, I presume, by the Owensboro Water Works Company for the purpose of looking over that property and making some estimate, were you not?

A. Yes, I suppose so.

Q. 139. You seem to have assumed in your testimony in
93 chief that the ordinance at Owensboro prevented the water company from collecting its rates in advance?

A. I so read it; that is what I draw from it.

Q. 140. If you are mistaken about that, to what extent would that modify your answer?

A. Well, I would say the rates are too low any way from my experience.

Q. 141. The ordinance doesn't prevent the collection of water rents in advance.

Counsel for complainant objects to statement by counsel for defendant City of Owensboro.

Q. 142. What amount of income would you say the Owensboro Water Company ought to make in order to pay operating expenses and a fair return on the present value of that property?

A. I don't know—not now.

Q. 143. Will you estimate it? It would cost how much to operate the plant per annum?

A. Ten to twelve thousand dollars.

Q. 144. I wish you would give the items that will enter into this cost of ten or twelve thousand dollars?

A. The fuel——

Q. 145. How much for fuel?

A. I can not tell that exactly.

Q. 146. Approximate it?

A. $4,000 per year; $3500 to $4000.

Q. 147. What other items?

A. Wear and tear on the machinery to operate, the salaries——

Q. 148. Wear and tear, how much do you say for that?

A. 2½ to 3 per cent.

Q. 149. What do you estimate for salaries?

A. I don't know just exactly, I don't know how many they employ there.

Q. 150. You put that amount at ten or twelve thousand dollars and I want the items if you can give them, and if you can not, I want you to say you can not give them?

A. I can not give them without learning them again.

Q. 151. Isn't it a fact that the salaries down there are about $1500 per annum.

A. From my remembrance they are.

Q. 152. Now, do you know what their office rent is?

A. I have forgotten.

Q. 153. You were at their office?

A. Yes.

Q. 154. It is in the Owensboro Savings Bank building?
94 A. I think it is.

Q. 155. What is it—about twelve or fifteen dollars per month?

A. I don't remember.

Q. 156. Do you know what they pay for wages?
A. I did know; I don't remember now.
Q. 157. Approximate it if you can?
A. I don't remember.
Q. 158. From whom did you get your information about the salaries and wages, etc., that enabled you to state here that the cost of operating that plant is ten or twelve thousand dollars?
A. I got it at the office there at that time.
Q. 159. Who showed you?
A. I think Mr. Martin told us.
Q. 160. Then you are testifying merely—not from your personal knowledge, but from the information furnished you by Mr. Martin?
A. I am as regards to the salaries, I think.
Q. 161. And the cost of operating the plant?
A. Not wholly.
Q. 162. In what respect are you going on information of your own?
A. They told me about the coal, etc., and judging from my own experience considerably.
Q. 163. Do you know how much coal they consume there per annum?
A. I did know; I don't remember now.
Q. 164. About how much ought they consume in a city the size of Owensboro?
A. They ought to consume between seven or eight tons per day. I don't just remember what it was now.
Q. 165. What do you estimate the coal at?
A. I think coal is $2 or $2.50 per ton there, if I remember correctly. I don't remember exactly.
Q. 166. Do you know what the gross income of that company was last year?
A. I don't remember.
Q. 167. Isn't it a fact that the cost of operating the Owensboro water works plant prudently ought not to exceed excluding interest, I speak now strictly of operating expenses, from six to seven thousand dollars per annum.
A. I am sure not; don't think it could be operated for that.
Q. 168. Have you ever been in the city of Henderson?
A. I just passed through there.
Q. 169. Did you ever examine their water works system there?
95 A. No, sir.
Q. 170. Wouldn't you think the water plants of the two cities——
A. I am not acquainted in Henderson whatever.
Q. 171. If you say the two systems are about the same size, twenty miles of pipe, pumping station, etc., the cities being about the same, they are only twenty-seven miles apart, wouldn't you say that the cost of operating the two plants ought to be about the same?

A. Well, conditions would enter into that, pressure carried in either city would amount to considerable, and the consumption of coal, how high the water would have to be pumped, the size of the mains, and the quantity of the pumps, the quality of the boilers, etc., and who operated the plant.

Q. 172. You are basing your assumption somewhat upon the business as carried on at Danville? Wouldn't it have been fairer to have gone into Henderson, where conditions are very similar to those at Owensboro and examined that water works plant?

Counsel for complainant objects.

A. I don't know anything about that part of it.

Counsel for complainant excepts to answer.

Q. 173. You didn't go there?

A. I was not called to examine the works at Henderson or Chicago.

Q. 174. Or any other place except Owensboro?

A. No, sir; the larger the place the more economically it can be run.

Re-direct examination by Mr. BINGHAM, for complainant:

Q. 175. Mr. Sidelinger, I will ask you if you didn't go to Owensboro for the purpose of making an examination of all the property owned by the Owensboro Water Works Company in that city?

A. Yes, sir.

Q. 176. As a result of that examination, were you or were you not familiar with its property?

A. Let me just say something in regard to that other question—you say "all the property"—I was called more especially in regard to the machinery and pipes, outfit, etc.

Q. 177. As a result of that examination were you or were you not familiar with the pumping station and the machinery and the pipe system of the Owensboro Water Works Company?

A. Yes, sir.

96 Q. 178. When you made your estimate as to the value of the water works system at the Owensboro Water Works Company, placing that value at from $235,000 to $250,000, did you or did you not know the number of miles of pipe in its system and the size and the present value of the same?

Counsel for city objects to question.

A. Yes, sir.

Counsel for city excepts to answer.

Q. 179. When you fixed your estimate at $235,000 to $250,000 as the present value of the water works system owned by the Owensboro Water Works Company and operated in the city of Owensboro, were you or were you not acquainted as to the value of its

pipe system, machinery, pumps, boilers, valves, meters, hydrants and tools?

Counsel for city objects.

A. Yes.

Counsel for city excepts to answer.

Q. 180. When you stated that it would cost from 2½ to 3 per cent. in the way of wear and tear on machinery, etc., did you or did you not mean to indicate that it would cost that much to keep the machinery in good condition?

Counsel for city objects.

A. Yes, sir.

Counsel for city excepts to answer.

Q. 181. From your examination of the system of the Owensboro Water Works Company, has it been kept in good condition, and is it now in good serviceable condition?

Counsel for city objects.

A. It was in fine condition when I saw it.

Counsel for defendant city excepts to answer.

Also the deposition, taken for complainant at the same time and place, of Maj. Edward Hughes.

The witness, Maj. EDWARD HUGHES, being first duly sworn, and being examined by Mr. Bingham, of counsel for complainant, testified as follows:

Q. 1. I will ask you to state your name, residence and occupation?

A. Edward Hughes, Louisville, Kentucky, and chief of the fire department.

Q. 2. How long have you been so engaged?

A. I have been chief now going on 21 years.

97 Q. 3. Have you examined the water works plant of the Owensboro Water Works Company, and if so, when?

A. Yes, about last April it was.

Q. 4. In what condition did you find the system with respect to its capacity and ability to furnish fire protection to the city of Owensboro?

A. Perfect.

Q. 5. State whether or not in your opinion the water works system is adequate in every respect to furnish adequate and complete fire protection to the city of Owensboro and its inhabitants?

Objected to by counsel for defendant city as leading.

A. Yes, sir.

Counsel for defendant city excepts to answer.

Q. 6. From your connection with the fire department in Louisville, I will ask you, Major Hughes, whether you have or have not general information as to fire protection for various cities throughout the United States?

A. I have.

Q. 7. I will ask you to state how the city of Owensboro in the matter of fire protection ranks with other cities of the United States?

A. Equal to any. I consider the fire protection of Owensboro from its water works system as first class.

Cross-examination by Mr. JOLLY, of counsel for defendant, City of Owensboro:

Q. 8. Have you ever been at Owensboro at any time when there was a fire raging in that city?

A. No, sir.

Q. 9. Do you know whether the Owensboro water works system has any large pipe in its distribution system or not?

A. I do not; I think though it must have large pipe.

Q. 10. Well, what do you mean by saying "large pipe"? What would you consider large pipe for that system?

A. Well, I think ten to sixteen inch pipe is large pipe. Large pipes vary.

Q. 11. Ought it have—say a pipe system of twenty miles in that town—ought it have any 24 inch pipe.

A. That part I can not tell; I think it could get along with less.

Q. 12. Ought it have any 20 inch pipe or 18 inch pipe?

A. That part I can not tell.

Q. 13. Major, if you should be at Owensboro sometime, or had been at Owensboro sometime when a fire was raging and you would see that the firemen were unable to throw water into a second story window, what would you think?

98 A. I would think it was a very poor stream.

Q. 14. Would you conclude from such a circumstance that there was some fault in the water works system or not?

A. I would not know where to fix the fault.

Re-direct examination by Mr. BINGHAM, for complainant:

Q. 15. I will ask you, Major Hughes, if you have ever seen the water works at Owensboro throw two or three good serviceable streams under service conditions?

A. I have.

Re-cross examination by Mr. JOLLY, for defendant city:

Q. 16. When was that?

A. That was several years ago, about the first workings of the water works.

Q. 17. Twenty years ago, perhaps?

A. I don't know; but I see from that time until this time there has been improved machinery put in since that time, and I think the improved machinery put in would make it more perfect than it was then.

Q. 18. That sort of stream might have been secured, might it not, by closing the pipes everywhere in the surrounding system and putting all direct pressure upon a single pipe?

A. No, sir.

Q. 19. Could not the valves have been closed in the surrounding pipes and have put the pressure from the engine at the water works station upon a single pipe and have thrown this stream?

A. The streams were located in such points that could not have been done.

Q. 20. Where were the streams thrown—at the court house?

A. At three different streets; three different streams.

Q. 21. What system have they at Owensboro—the Holly system?

A. I think it is the Holly—I don't know—it is the system pumps directly into the pipes.

Also the deposition of William J. McGonigale, taken for complainant at the same time and place.

The witness, WILLIAM J. MCGONIGALE, being first duly sworn, and being examined by Mr. Bingham, of counsel for complainant, testified as follows:

99 Q. 1. Please state your name, residence and occupation?

A. William J. McGonigale, reside in Louisville, Kentucky; I am employed as secretary and treasurer and auditor for the following water companies: Auditor, secretary and treasurer for the Danville Water Company of Danville, Illinois; auditor, secretary and treasurer for the Owensboro Water Works Company; auditor and secretary for the Defiance Water Company; auditor for the Frankfort Water Company.

Q. 2. How long have you been connected with the business of water companies?

A. Since June, 1897.

Q. 3. I will ask you, Mr. McGonigale, to state if from your connection with, observation of and experience in the operation of water works companies, you have sufficient knowledge to be able to state the value of a water works plant when you have carefully examined such a plant?

A. I have.

Q. 4. Have you or not carefully examined the Owensboro Water Works Company plant in Owensboro, Kentucky, both respecting its

piping system, its hydrant connections, etc., and its pumping station?

A. I have.

Q. 5. What, in your judgment, is a present fair cash value of the Owensboro Water Works Company plant as it stand- to-day in operation?

A. My judgment is that the plant as it stands to-day is worth between $235,000 and $250,000.

Q. 6. From your official position in connection with the Owensboro Water Works Company, are you able to make an accurate estimate of the cost of operating its plant?

A. I am.

Q. 7. Are you in a position to state whether or not the Owensboro Water Works Company is operated upon a prudent, conservative and economical basis?

Counsel for defendant city objects to foregoing question as leading.

A. I believe it is.

Counsel for defendant city excepts to answer.

Q. 8. In your judgment what would be the actual annual operating expenses of the Owensboro Water Works Company, apart from interest or taxes or any return on its investment?

A. The actual operating expenses might fluctuate from year to year, but I believe on a conservative, economical basis the
100 plant cannot be operated for less than $13,000.

Q. 9. Has it cost the Owensboro Water Works Company that sum since you have been connected with it, to operate its works?

Counsel for defendant city objects.

A. It has.

Counsel for defendant city excepts to answer.

Q. 10. State whether or not there has been any item of expense connected with operating this plant that could have been dispensed with in order to preserve the integrity and efficiency of the system?

A. I don't believe there has been an expenditure made that was not thought to be necessary—considered necessary.

Q. 11. What, in your judgment, would be a fair estimate as to the annual wear and tear of the Owensboro Water Works Company plant?

A. I should think from the knowledge that I have of such matters that the wear and tear of the plant like the Owensboro Water Works Company would amount to somewhere in the neighborhood of three or four per cent. per annum.

Q. 12. Is or is not the system of the Owensboro Water Works Company at present in good condition?

A. I consider it to be in splendid condition.

Q. 13. Can you state, Mr. McGonigale, the amount of taxes assessed against this company, the total amount of taxes assessed annually?

A. Do you mean for any special year?

Q. 14. As far back as your knowledge runs?

A. I can state in general terms that the taxes assessed have ranged in amount from $2500 to about $5000, at different times.

Q. 15. Have you examined the ordinance of March 19th, 1900, of which the water works company in this case complains?

A. I have.

Q. 16. Are you or not, Mr. McGonigale, familiar with the rates charged by water companies throughout the United States and the rules and regulations adopted by these companies for the management of their business?

A. I have read and investigated the printed rules and regulations of a great many water companies throughout this United States, and in that way I am in a general way familiar with them.

Q. 17. Are the rates fixed in the ordinance complained of in this case above or below the average charged throughout cities of
101 the United States as far as you know?

A. My opinion is they are below the average.

Q. 17. In your opinion, Mr. McGonigale, would it be possible for a water company to operate its business successfully which did not collect its rates in advance?

A. I do not think they could operate satisfactorily, nor successfully on such a basis.

Q. 18. In your judgment what loss would be caused to a water company attempting to collect its rates after the service had been rendered?

A. I probably can speak more particularly about Owensboro; I know something about the payment of water rents in Owensboro, and I can surely say the loss would be—the loss caused actually by the payments being collected at the end of the service would amount to something like twenty per cent. of the revenue.

Q. 19. As compared with the present rates charged by the Owensboro Water Works Company, what would be the amount or the per cent. of reduction in its revenue, if the ordinance complained of were put into effect, provided every dollar could be collected?

A. After investigating the charges that would be made against consumers on our books in Owensboro, and fixing the revenue basis upon rates provided in the ordinance referred to, I say the revenue from private consumers would be reduced at least 50 per cent.

Q. 20. Do you know of any water company which does not collect its water rates in advance?

A. I do not.

Q. 21. What effect, in your judgment, would the provisions of this ordinance complained of in regard to the collection of water rents have upon the Owensboro Water Works Company?

A. I think it would be very ruinous to the business of the company.

Q. 22. On what do you base your judgment?

A. Upon the fact that the rates are so low that the revenue would not be sufficient to permit the company to operate, and on account of the conditions that provide that the revenue shall be collected at the end of the term rather than in advance, as is usually the case with water companies.

Q. 23. Can you state the number of private consumers which the Owensboro Water Works Company has at present?

A. They have at present between twelve and thirteen hundred consumers.

102 Q. 24. How does this compare with the average number the company has had for the last ten years—is it higher or lower?

A. The number of consumers we have at present are greater than in the history of the company.

Q. 25. What is the amount of hydrant rental which the Owensboro Water Works Company receives at present from the city of Owensboro annually?

A. $7595.

Q. 26. Has the company any other source of revenue aside from that obtained from the city for hydrant rental, and from its private consumers?

A. No.

Q. 27. On the basis of the proposed ordinance, would the Owensboro Water Works Company receive a revenue sufficient to pay its operating expenses, natural wear and tear of the property and any return on its investment?

A. In my opinion it would not.

Q. 28. In your judgment what would be the net annual loss to the company operating under this ordinance?

A. $5600.

Q. 29. Do you assume in making that answer that the water company would collect all of its rates under the proposed ordinance?

A. That result is arrived at provided every dollar is collected from its consumers.

Q. 30. Mr. McGonigale, are you in a position to state whether or not the Owensboro Water Works Company has ever paid any dividend to its stockholders?

A. I certainly am.

Q. 31. Has the company ever at any time paid any dividend to its stockholders?

A. Never.

Q. 32. During the past year was the company operated at a profit or at a loss?

A. The company lost money last year.

Q. 33. Can you state the amount the company lost?

A. In round numbers, $3,000.

Q. 34. Under the proposed ordinance what would be the amount the company would receive from domestic services?

A. $11,500.
Q. 35. From hydrant rental?
A. $7595.
Q. 36. What is your estimate for the operating expenses of the Owensboro Water Works Company?
A. $13,000.
Q. 37. And for taxes?
103 A. $2500.
Q. 38. And for depreciation?
A. If I remember rightly, I estimated it at $9,000. I have no reason to change that now.
Q. 39. That is assuming that every dollar from domestic services would be collected?
A. Yes.
Q. 40. Can you state what per cent. of loss the company suffers on domestic service at present, collecting its rates in advance?
A. In the neighborhood of 20 per cent.
Q. 41. In your judgment would this be increased or diminished if the company was forced to collect its rates after the service?
A. I surely think it would be increased.
Q. 42. Did or did not your estimate of $5600 as a net annual loss to the company from operating under the proposed ordinance include any estimate for uncollectible bills?
A. Oh, no, it did not include an estimate for uncollectible bills; that, as I state above, would be the result, provided every dollar was collected.
Q. 43. In your judgment what would be a reasonable estimate of uncollectible bills if the company should operate under the proposed ordinance?
A. I can surely say we would lose in the neighborhood of $2,000 a year of the revenue.
Q. 44. In your judgment what is the present condition of the Owensboro Water Works Company as to its ability to furnish fire protection and adequate water supply to the citizens of Owensboro?
A. I consider the plant a most efficient one in every way.

Cross-examination by Mr. JOLLY, counsel for City of Owensboro, defendant:

Q. 45. Mr. McGonigale, what is your age?
A. Thirty-three years.
Q. 46. Where were you born and reared?
A. Louisville, Kentucky.
Q. 47. What has been your business heretofore?
A. Do you want a history?
Q. 48. Well, I want to find out what capacity you have?
A. I commenced my business career in the Merchants national bank; from that I was employed in a wholesale grocery three years in each; from the wholesale grocery I engaged in the in-
104 surance business about three years, possibly four, and from that line of business I accepted the position I now hold.

Q. 49. Are you related to the stockholders, or any of them, of the Owensboro Water Works Company?

A. Yes, sir.

Q. 50. State what your relationship is?

A. I am related by marriage to Mr. R. W. Bingham. Do you want the individual names of the stockholders and my relation to them? You know there are a great many stockholders; yes I am related to some of the stockholders—not all of them.

Q. 51. Who are the stockholders in the Owensboro water works system?

A. I can give you some of the principal ones; without the list I could not give them all.

Q. 52. Give me all you can?

A. Mr. J. W. Holmes is a stockholder.

Q. 53. What amount of stock does Mr. Holmes hold?

A. That I can not say; we have the records at the office; if I had known you wanted them—D. Long Miller is a stockholder——

Q. 54. How much stock does he hold?

A. That I can not say. The idea I want to convey is I do not know the exact amount of stock—I can give you in general terms about the number of shares, but they are divided up and I can not remember exactly.

Q. 53. Give any information you can?

A. Mr. Miller has somewhere in the neighborhood of 500 shares of stock; Mr. Holmes has, I think, in the neighborhood of 500 shares; Mr. R. W. Bingham is a stockholder, I forget how many shares Mr. Bingham has, I suppose about 500 shares, I may be wrong on these numbers; Mr. W. W. Davies is a stockholder, has about 500 shares; Capt. John Long is a stockholder, has one share. I have three shares of stock in the company, which were placed in my name simply to qualify me as secretary and treasurer of the company; these are the principal stockholders I don't remember others.

Mr. Bingham, for complainant, objects and excepts to above question and answer.

Q. 56. What is the total amount of stock of the company?

A. $335,000 is the total amount; 3350 shares.

Q. 57. There must be others; that is not all?

A. Yes, there are others, but I don't remember them

Q. 58. Can you get a list and the amount held by each?

A. Yes.

Q. 59. I ask you to do that; you have the books of the water company in your possession, haven't you?

105 A. Yes.

Q. 60. Who has charge of these records?

A. Mr. Martin has charge of some of them, and I have some.

Q. 61. What sort of records has he charge of?

A. He has charge of the book called the ledger, which has the names of the consumers in it, and he has the meter book, the cash book——

Q. 62. Those are the records kept by Mr. Martin?
A. I believe that I might add he has some books there he makes out his water bills in.
Q. 63. Who has charge of the books showing the organization of the Owensboro Water Company and the Owensboro Water Works Company, its stockholders and its bonded account, and its general indebtedness, floating debt, and the books showing the cost and expense of operation from year to year, and the gross income?
A. I have charge of all those books that relate to the Owensboro Water Works Company.
Q. 64. Do you know where the books are of the Owensboro Water Company, the predecessor of this company?
A. I do not; they may be filed away somewhere.
Q. 65. Have you any information about their accounts?
A. I have not; I have never seen them.

Here the taking of said deposition was adjourned until later in the day, November 15th, 1900, at 2:30 o'clock.

November 15th, 1900.—Met pursuant to adjournment, and the taking of Mr. William J. McGonigale's deposition was resumed at 3:20 o'clock, as follows:

Cross-examination continued by Mr. JOLLY:

Q. 66. Mr. McGonigale, you may state the names of the stockholders and the amount of stock held by each, if you please?

Mr. BINGHAM, for complainant: I object to that, as it is wholly irrelevant.

A. Mr. Jolly, upon advice of counsel, I will have to refuse to answer.

The stenographer requested the witness to answer and submit the relevancy of the question to the court.

A. I refuse to answer the question.

The witness refused to answer the above question, and on
106 motion of Mr. Jolly, counsel for defendant City of Owensboro, I hereby certify said question to the court as to whether or not said witness should answer the question.

Q. 67. Why do you refuse to answer, Mr. McGonigale?
A. I am advised by counsel not to answer.
Q. 68. Who so advised you?
A. Counsel present—Mr. R. W. Bingham.
Q. 69. Mr. Bingham is conducting the examination for the water company in this case?
A. Yes.
Q. 70. And upon his advice you refuse to answer the question?
A. Yes,

Q. 71. Do your books show who the stockholders are?
A. They do.
Q. 72. You have those books here?
A. I haven't the stock book here.
Q. 73. But you have access to it?
A. Yes, sir; it is in my custody. I brought all the books except that; it was a large book and the back was off, and I didn't know you wanted that special book. I understood you asked for books that related to the bonded indebtedness and general accounts.
Q. 74. I meant for you to bring that book also. Well, you have stated, I believe, that there are 3550 shares of stock?
A. Yes, sir, I have.
Q. 75. Those shares are $100 each?
A. Par value $100 each.
Q. 76. Making a total amount of stock, $355,000?
A. Par value of the stock is $355,000.
Q. 77. What is the bonded indebtedness of the Owensboro Water Works Company?

Counsel for complainant objects to question.

A. $235,000.

Counsel for complainant excepts to answer.

Q. 78. Can you state what the bonded indebtedness of the company was on the 15th day of September, 1899?

Counsel for complainant objects to question.

A. As well as I remember it was $235,000 or $236,000.

Excepted to by counsel for complainant.

Q. 79. Can you state what it was September 15, 1898?

Objected to by counsel for complainant.

A. I can not.

Excepted to by counsel for complainant.

Q. 80. Approximately?
A. Approximately the bonded indebtedness was about the same as it was in September, 1899.

107 Counsel for complainant both objects and excepts to above question and answer.

Q. 81. Can you state what it was in September, 1897?

Objected to by counsel for complainant.

A. I can not.

Excepted to by counsel for complainant.

Q. 82. Can you state it approximately?

Objected to by counsel for complainant.

A. I should say about $236,000.

Excepted to by counsel for complainant.

Q. 83. Can you state what the floating debt of the water company was in September—September 15th, 1897?

Objected to by counsel for complainant.

A. I don't remember.

Excepted to by counsel for complainant.

Q. 84. Did it have any floating debt at that time?

Objected to by counsel for complainant.

A. It had.

Excepted to by counsel for complainant.

Q. 85. Can you state what the floating debt was September 15th, 1898?

Objected to by counsel for complainant.

A. I can not.

Excepted to by counsel for complainant.

Q. 86. Can you approximate it?

A. No, I can not.

Q. 87. Wasn't it about $20,000?

Objected to by counsel for complainant.

A. I can not say what it was.

Excepted to by counsel for complainant.

Q. 88. Have you any books here from which you can state it?

A. I have not.

Q. 89. Can you state what the floating debt of the Owensboro Water Works Company was September 15th, 1899?

Objected to by counsel for complainant.

A. I can not.

Excepted to by counsel for complainant.

Q. 90. Wasn't it $19,500?

Objected to by counsel for complainant.

A. I don't remember.

Excepted to by counsel for complainant.

Q. 91. The reports that were made by the Owensboro Water Works Company to the auditor of State under article 3, chapter 108 of the Kentucky Statutes, were they not prepared by you?

108 Objected to by counsel for complainant.

A. I may have had something to do with preparing them, but they were not fully made up by me.

Excepted to by counsel for complainant.

Q. 92. Didn't you furnish the figures?
A. Not all of them.
Q. 93. Well, who else has access to these books besides yourself from which that report could have been prepared?

Objected to by counsel for complainant.

A. The president has access, the vice-president, the superintendent.

Excepted to by counsel for complainant.

Q. 94. Can you state what the gross income of the Owensboro Water Company was for the year 1899?
A. Not exactly.
Q. 95. Can you state it approximately?

Objected to by counsel for complainant.

A. Approximately, the gross income for the year 1899 was about $29,000, as nearly as I remember.

Excepted to by counsel for complainant.

Q. 96. Have you any books here from which you can state the gross income of the Owensboro Water Works Company for the year 1899?
A. I have.
Q. 97. Please examine your books and state the gross income for that year?

Mr. Bingham, counsel for the complainant objects and excepts to the production of any of the books of the Owensboro Water Works Company for the reason that the court has not ordered the production of the said books and that nothing therein contained is relevant to the question at issue in this case, but the complainant, Owensboro Water Works Company, avows its willingness to produce such books at any time the court may so order, when the examination in regard to its books can be conducted under the rules of evidence prevailing in the courts of the United States.

Q. 98. I have asked you to state, Mr. McGonigale, the exact gross income of the Owensboro Water Works Company for the year 1899, and you say you have now here in your personal possession books from which you could state that fact. I do not ask to examine your books—I ask you to examine them and state the fact from your books?

Objected to by counsel for complainant.

A. The total income received by the company for the year
109 ending June 30th, 1899, according to my books shows $29764.29, $2021.19 of which is for water rentals received partly in a previous year.

Excepted to by counsel for complainant.

Q. 99. Now, Mr. McGonigale, please state the gross income of the Owensboro Water Works Company for the year ending June 30th, 1900?

Objected to by counsel for complainant.

A. The gross income, my books show, was $31,577.43, $1985.71 of which partly applies to previous periods.

Excepted to by counsel for complainant.

Q. 100. What part of it applies to previous periods?

A. That I can not tell.

Q. 101. What is included in that?

A. Old bills which we really could not tell whether we could ever collect at all, and collected from time to time and didn't properly belong to gross income for that year.

Q. 102. Now, Mr. McGonigale, what amount of that $31,577.43 is made up of money received from the city of Owensboro for hydrant rentals for that year?

A. $7384.57 is the amount of hydrant rental received for the year ending June 30th, 1900.

Q. 103. What amount of salaries were paid and to whom for the year ending June 30th, 1899, by the Owensboro Water Works Company?

Objected to by counsel for complainant.

A. Well, in salaries, you mean, or wages and everything?

Q. 104. No, I don't mean wages, I mean salaries?

A. There have been no salaries paid except in the last year, that is what we call salaries, we treat it as wages.

Excepted to by counsel for complainant.

Q. 105. Well, take the year 1899 ending June 30th, and state the amount of salaries and wages paid for that year and to whom they were paid?

Objected to by counsel for complainant.

A. My fiscal year shows here $4139.32. It is possible that at that time there was owing certain money for salaries which were not paid in time to allow the entry to be shown in the closing of the fiscal year. You know sometimes they run over.

Excepted to by counsel for complainant.

Q. 106. State to whom these salaries were paid, what officers and employés I mean, and how much each. Can you do that from your books?

A. I haven't the details there.

Objected to by counsel for complainant.
Excepted to by counsel for complainant.

110 Q. 107. Well, approximate as well as you can from memory.

Objected to by counsel for complainant.

A. I will answer that question in this way. The secretary, treasurer and auditor, they all describe one man, one employé, the superintendent, engineer, firemen, clerk in office at Owensboro, are those who were paid for their services in that year.

Excepted to by counsel for complainant.

Q. 108. You mean to say now these persons whom you named received $4139.32?

Objected to by counsel for complainant.

A. I do.

Excepted to by counsel for complainant.

Q. 109. Now, then, I will ask you to state, Mr. McGonigale, how much salary you as auditor, etc., receive- in that year?

Objected to by counsel for complainant.

A. I received $360 during that year, provided I drew the full twelve months' salary for the year ending June 30th, 1899.

Excepted to by counsel for complainant.

Q. 110. How much was Mr. Martin paid, the superintendent?

Objected to by counsel for complainant.

A. Mr. Martin's salary hasn't always been the same; approximately he drew $1200.

Excepted to by counsel for complainant.

Q. 111. You have a man there named Williams who is an employé; what is he?
A. He is an engineer.
Q. 112. What is his salary?

Objected to by counsel for complainant.

A. His salary was approximately $1300.
Q. 113. Have you any other engineers?
A. We have two men at the station in addition to the engineer who properly described, I should think, would be termed assistant engineers.
Q. 114. What do they get?

Objected to by counsel for complainant.

A. Each drew approximately $600 a year.

Excepted to by counsel for complainant.

Q. 115. You have a young lady there, haven't you?

A. We have.

Q. 116. And she received about what?

Objected to by counsel for complainant.

A. She received approximately $420.

Excepted to by counsel for complainant.

111 Q. 117. Mr. McGonigale, what did you pay for taxes for the year 1899 to the State of Kentucky, to the county of Daviess, and to the city of Owensboro, and for the year 1900. What did you pay to the State, county and city?

A. I don't remember the amount.

Q. 118. Can not you state that from your books?

A. I think I can.

Q. 119. State the State taxes, county taxes and city taxes separately for the years 1899 and 1900?

A. We generally charge that up as State and county taxes.

Q. 120. All right, State and county, and then the city?

A. My books show that in 1899 we paid for State and county ad valorem taxes, $581.25; city ad valorem, $1122.75; State franchise, $180.60; county franchise, $86; city franchise, $516; city license, $50; making total, $2536.60.

Q. 121. Now for 1900, please?

A. My books show that we paid in 1900, city ad valorem taxes, $1122.75; for further answer to this question I will state that we have paid as yet no State and county ad valorem taxes, no State franchise tax, no county franchise tax and no city franchise tax for the reason that I presume the returns from the proper authorities assessing the valuation to determine these taxes have not been made. At least that is the case in regard to the franchise tax; the State and county ad valorem tax, I believe, is due sometime in November. I might add we have made our returns to the assessor at Owensboro and are ready to pay the State and county taxes before the time is out.

Q. 122. Can you state what amount you paid for coal used at the Owensboro Water Works Company plant for the year ending June 30th, 1900, and I also want you to state for the preceding year 1899?

A. My books show for the year ending June 30th, 1899, we paid for fuel, $899.49. The books show we paid for fuel ending June 30th, 1900, $892.75. It is possible that we owed some coal bills at the end of that period that were not paid in time to be included in this account.

Q. 123. But you mean to say that those amounts are approximately correct?

A. Yes, sir.

Q. 124. And they are the amounts shown by your books?

A. Yes, sir.

Q. 125. Can you state what you paid for stationery and office expenses there at Owensboro, those small details?

112 A. No, sir, I can not.

Q. 126. Can you approximate it?

A. I would not like to undertake to approximate a thing of that kind, it would be a very hard thing to do.

Q. 127. Well, one or two hundred dollars would cover it, wouldn't it?

A. I don't think it would.

Q. 128. Do you know what you paid for office rent at Owensboro—you have office in the Owensboro Savings Bank building, haven't you?

A. Yes; I don't know what the rental is.

Q. 129. Don't your books show?

A. No, sir; it don't show; at least I have no account here; it is charged in general expense account.

Q. 130. Did the company make any enlargement of its plant in the year 1899?

A. I don't remember that it did; I don't know that it did.

Q. 131. In 1898, did it?

A. I don't know of anything.

Q. 132. Isn't it true, can not you say it did not?

A. Well, Mr. Jolly, I am not familiar with the practical part of the work down there, and if I said it didn't I might be guessing at it, as I don't know.

Q. 133. I thought your books would show?

A. My books would probably show if there were any improvements made.

Q. 134. Well, now in 1897 do you know and can you state whether anything was expended for improvements of the plant?

Objected to by counsel for complainant.

A. No, sir.

Excepted to by counsel for complainant.

Q. 135. Well, Mr. McGonigale, I will ask you to state how this floating debt of $19,500 shown by your report to the auditor for the year 1899 was created—for what purpose?

Objected to by counsel for complainant.

A. I don't know that I can explain that, Mr. Jolly, in detail; I can not explain in detail that floating debt.

Excepted to by counsel for complainant.

Q. 136. Can you explain it at all?

Objected to by counsel for complainant.

A. In a general way. I know the company was in debt, owed taxes, bills payable, owed attorneys' fees; that would probably account for whatever floating debt I can think of now.

Excepted to by counsel for complainant.

113 Q. 137. Isn't it true that all of its taxes were paid up to the year 1900?

A. Not that I know of.

Q. 138. I do not understand that you owe any taxes, any county or city, except for the year 1900?

Objected to by counsel for complainant.

A. If that is a fact, I don't know it.

Excepted to by counsel for complainant.

Q. 139. Do you know what the floating indebtedness as shown in report of 1898, then stated to be $20,000, was created for—is that the debt of 1899, the same as carried forward from the year 1898?

A. It must have been.

Q. 140. The company's furnished reports to the auditor shows in 1897 you had no floating indebtedness, and in 1898 you had $20,000, I was trying to find out what you knew about the creation of this floating indebtedness?

Objected to by counsel for complainant.

A. Well, the floating debt was created as I answered before by taxes unpaid, bills payable, attorneys' fees, etc.

Excepted to by counsel for complainant.

Q. 141. Do you remember what attorneys' fees, and who the attorneys were, who had the fees?

Objected to by counsel for complainant.

A. I do not.

Excepted to by counsel for complainant.

Q. 142. Now, I have heretofore called your attention to the report made under article 3, chapter 108 of the Kentucky Statutes to the auditor, some of the details of which as I understand were made up from your books by you. Among other things stated in that report under the head of "Tangible property, pipe system, pumping station, machinery for pumping station, tools, hydrants, lot on which pumping station is erected, vacant lot on corner of McFarland and Triplett streets, and three acres of land in Daviess county—fair cash value of tangible property at the prices it would bring at a fair voluntary sale, $75,000." Was that statement made September 27th approximately correct?

Objected to by counsel for complainant.

A. As I did not make the statement in question, I prefer not to state whether or not I think it correct or incorrect.

Excepted to by counsel for complainant.

Q. 143. I understood you to say sometime during this examina-

tion that some part of the information contained in those reports by the president to the auditor were furnished by you?

114 A. That is a fact.

Q. 144. Now then did you furnish that particular information?

A. I did not.

Q. 145. Where is Mr. D. Long Miller?

A. Just at present I can not say; I suppose he is somewhere in Louisville.

Q. 146. He is in the city of Louisville now?

A. I presume he is.

Q. 147. In these books which you have here, is there an estimate made of the value of this property from which this statement is made up, do you know?

Objected to by counsel for complainant.

A. The accounts in the books show the value of the property.

Excepted to by counsel for complainant.

Q. 148. Does the account in the book correspond with this statement, do you know?

Objected to by counsel for complainant.

A. The accounts in the book show what moneys have been expended upon the plant in a constructive way from the time the books were opened, but they do not allow for depreciation.

Excepted to by counsel for complainant.

Q. 149. When were the books opened?

A. I should say the books were opened upon the organization of the Owensboro Water Works Company. As I was not with the company at that time and have not had occasion to look at the date of the opening of the books, I don't know.

Q. 150. Have you any books, papers or memoranda in your possession that will show what the Owensboro water works system cost originally?

A. The books of the Owensboro Water Works Company show the money that has been expended upon the plant.

Q. 151. From what date?

A. From the time the Owensboro Water Works Company came into existence.

Q. 152. Do you know when the Owensboro Water Works Company was organized—the present corporation?

A. I don't know the exact date.

Q. 153. Can you state about the date?

A. I think the Owensboro Water Works Company was organized about 1892. I may be mistaken in that.

Q. 154. Have you any books or papers or memoranda in

115 your possession that will show what the Owensboro water works system cost originally when it was constructed—I think it was built in 1878 or 1879 or 1880?

A. I have no books or papers in my possession that would show the cost of the original construction of the plant which I understand was built about 1879.

Q. 155. Have you any knowledge or information of the present whereabouts of the books and papers of the Owensboro Water Company, the predecessor of the Owensboro Water Works Company?

A. I have not.

Q. 156. Do you know whether they have been destroyed or not?

A. I do not.

Q. 157. Have you any information on that subject?

A. I have not.

Q. 158. Have you ever seen since your connection with the company any statement at any time made by anybody connected with the company as to the original cost of the Owensboro water works system?

A. I have never seen a statement nor have I any knowledge of the original cost of the system which is said to have been built in 1878.

Q. 159. Have you ever seen at any time any statement by any one connected with the present Owensboro Water Works Company of either the original cost of the water works system or its actual cost up to the time of the organization of the Owensboro Water Works Company?

A. I have not.

Q. 160. Have you any knowledge or information as to the cost of the water works plant at Owensboro at the time it was transferred to the Owensboro Water Works Company?

A. I have not.

Q. 161. You have heretofore stated that the bonded indebtedness of the Owensboro Water Works Company is now approximately $235,000 or $236,000—those bonds are secured by a mortgage or mortgages on that company's property and franchises?

A. They are.

Q. 162. Are those bonds all secured by one mortgage or more than one mortgage?

A. The knowledge I have of the mortgage issued by the Owensboro Water Works Company is that the bonds were issued on the plant of the Owensboro Water Works Company and secured by its property and franchises, subject to a previous mortgage, with the intention of exchanging the last issue of bonds for the outstanding issue, which resulted in all of the outstanding bonds being
116 retired of the previous issue, except five. My understanding is that there are now five bonds outstanding against the property of the Owensboro Water Works Company and $229,000 worth of bonds which represent the last issue, making the total of $234,000 bonded indebtedness to-day.

Q. 163. Can you state the date of that last mortgage?

A. I can not. The bonds were issued according to the reports of the company upon the organization of the Owensboro Water Works Company.

Q. 164. There was a mortgage made by the Owensboro Water Works Company July 1st, 1889, for $250,000, is that the mortgage you are referring to?

Objected to by counsel for complainant.

A. If the company was organized in 1889, and it is probable it was, I refer to that mortgage of $250,000 issued at that time.

Excepted to by counsel for complainant.

Here the taking of said deposition was adjourned until the folfowing day, November 16th, 1900, at 10 o'clock a. m.

Met pursuant to adjournment, November 16th, 1900, at 10 a. m. and the cross-examination of Mr. Gonigale was continued by Mr. Jolly, counsel for defendant, City of Owensboro:

Q. 165. Mr. McGonigale, please state what rate of interest these bonds bear?

A. These bonds at the time of issue bore 6 per cent., I believe in 1897 on account of a deficiency in the revenue as compared to expense of running the company, the interest was reduced by the bondholders to 5 per cent. with the exception of the $5,000 old bonds known as the Owensboro Water Company bonds, which still bear six per cent. interest.

Q. 166. Were you in the employ of the company at the time this reduction was made?

A. Yes, sir; the reduction was agreed upon the latter part of the year 1897.

Q. 167. What was your total interest account for the year 1899, Mr. McGonigale.

A. The interest paid as shown at the close of the interest account for the fiscal year ending June 30th, 1899, amounted to $12,064.95.

Q. 168. At what period is the interest payable?

A. Interest on the bonds of the old issue or rather the five
117 outstanding bonds of the Owensboro Water Company is payable on April 1st and October 1st; the interest on the bonds of The Owensboro Water Works Company, the complainant, is payable January 1st and July 1st. This includes some discount paid on notes for borrowed money.

Q. 169. Mr. McGonigale, how many private consumers of water have you at Owensboro?

A. The number of consumers fluctuates from month to month; to my best knowledge and information, we have between twelve and thirteen hundred consumers.

Q. 170. You do not include the city of Owensboro in the contract you have with it for hydrant rental in that estimate, do you?

A. Those are our private consumers, as distinct from the city.

Q. 172. Have you ever been employed by any water works company where rates have been materially reduced during the time you were employed by the company?

Objected to by counsel for complainant as wholly irrelevant.

A. I have not; I might add that I have been employed by a company that temporarily reduced rates.

Excepted to by counsel for complainant.

Q. 173. Have you any such personal experience as an employé of water companies as would enable you to state even approximately the probable extent of increased consumption that would result to a water company by a reduction of rates 33⅓ per cent.?

A. I have.

Q. 174. What is that experience?

A. My experience is that it reduces the revenue of the company to a most unsatisfactory figure on the one hand and increases the expense of operation on the other hand.

Q. 175. I beg to say that is no answer to my question; please answer my question, if you can?

A. My understanding of your question prompted me to answer as I have.

Q. 176. You will observe my question is to what extent will such a reduction increase the consumption of water?

A. I will answer by saying from my knowledge of such conditions the consumption of water will be increased to such an extent that the expense of operation of the plant will be added to.

Q. 177. The Owensboro Water Works Company has no reservoir, has it?

118 A. It has not.

Q. 178. And it has no stand pipes, has it?

A. It has not.

Q. 179. You have no means of storing water for consumption, have you?

A. We have not, and I might add to that answer the stand pipe is not considered at this day a necessary adjunct in so far as it is apt to interfere with pressure in case of a fire, because if the water in the stand pipes is allowed to temporarily be low the full pressure or as much pressure as could be given by direct pumping could not be attained until a stand pipe is pumped full.

Q. 180. You are not the graduate of any school of civil engineering, are you?

A. I am not.

Q. 181. You are not a water works architect, are you?

A. I am not.

Q. 182. You have never superintended the construction of a water works plant, have you?

A. I have not, but I have consulted with a great many expert water works men and know their views in regard to stand pipes.

Q. 183. That is to say you have, while not an expert yourself, on any of such matter as I just now inquired about, you have talked with people who are experts and now undertake to tell me what the experts say?

A. I am simply stating what is known to be a fact from actual experience.

Q. 184. Can you state how many miles or feet of pipe you have laid at Owensboro outside of the corporate limits of the city, at the time it was laid for the accommodation of people living outside the corporation, and for the accommodation of distillers?

A. I can not.

Q. 185. Can you state approximately how many feet there are?

A. I can not.

Q. 186. Can you say that it was as much as two or three miles, or that it was not as much as two or three miles?

A. Whatever statement I would make in regard to the pipe in question would be a mere estimate, as I am not familiar with the measurement of lines referred to, if any?

Q. 187. Can you state approximately the total number of feet in the pipe system?

A. From the information I have on this subject, which I
119 believe to be exact, or approximately so, there are 110,880 feet of pipe, which is approximately 21 miles of pipe system.

Q. 188. Don't you know that there is a pipe leading up to the sour mash distillery about a mile in length?

A. I know our pipe extends to the sour mash distillery; I do not know the length of it outside the corporate limits.

Q. 189. And isn't your pipe laid in Griffith avenue outside the corporate limits?

A. I believe we have a pipe in Griffith avenue; I don't know where the corporate limits are.

Q. 190. Now, where do you get your information from?

A. From records kept on file in our office at Owensboro.

Q. 191. Not in your custody?

A. They are not in my custody.

Q. 192. In whose custody are those records?

A. I presume they are in the custody of the superintendent at Owensboro.

Q. 193. You mean Mr. Martin?

A. Mr. Martin is the superintendent, yes, sir.

Q. 194. Did you bring your stock book this morning?

A. I did not.

Q. 195. Are you able to give me the names of the additional stockholders?

A. I am.

Q. 196. I will ask you to state the names of the additional stockholders and the amount of stock held by them?

Objected to by counsel for complainant, Mr. Bingham, who advises the witness not to answer it.

Q. 197. I request an answer.

A. Upon advice of counsel I refuse to answer.

Q. 198. Who advised you to refuse to answer?

A. Mr. R. W. Bingham.

Q. 199. The complainant's attorney?

A. Yes.

Re-direct examination by Mr. BINGHAM, for complainant:

Q. 200. In addition to the interest which the Owensboro Water Works Company is compelled to pay, is there any charge for sinking fund purposes, and if so, what is the amount paid for that purpose for the fiscal year ending June 30th, 1900?

A. $1213.50 is the amount of sinking fund charges.

Q. 201. Mr. McGonigale, since your connection with the
120 Owensboro Water Works Company, as its auditor, has the company operating under its present rates and rules shown a profit or loss from its business.

A. It has shown a loss.

Q. 202. In your judgment has the company been wise and economically managed or not?

Objected to by counsel for defendant city.

A. I think it has been well managed.

Excepted to by counsel for defendant city.

Q. 203. I will ask you to state again whether or not if the ordinance complained of in this action should be put into effect the company would receive a revenue sufficient for the operation of its works and any return on its investment?

Objected to by counsel for defendant city.

A. I certainly did not think the company would receive any income or return upon its investment if operated under the ordinance in question. In fact I think the company would be compelled to go into the hands of a receiver very soon after the commencement of such operation.

Excepted to by counsel for defendant city.

Also the deposition of Mr. George J. Long, taken at the same place, November 16th, 1900.

The witness, GEORGE J. LONG, being first duly sworn, and being examined by Mr. Bingham of counsel for complainant, testified as follows:

Q. 1. Please state your name, residence and occupation?

A. George J. Long; residence, Jefferson county; occupation, resident manager of the Louisville Branch United States Cast Iron Pipe and Foundry Company.

Q. 2. What is the business of this company?

A. Manufacture of cast iron, gas and water and culvert pipes.

Q. 3. How long have you been connected with the manufacture of gas and water pipes, etc.?

A. All my business life.

Q. 4. Have you ever had any experience in the erection and management of water companies?

A. I have had considerable experience in the management of various water companies in different States; have had some ex-
121 perience in construction which I received through the management of these companies.

Q. 5. Has this experience made you familiar or not with the cost of constructing, maintaining and operating water works plants?

A. Somewhat.

Q. 6. Are you at present connected with the management of any water works companies? If so, state where?

A. I am the president of the Danville Water Company, Danville, Illinois; I actively manage the Defiance Water Company, Defiance, Ohio; while not in an official position in the Frankfort Company, I take quite a part in it; those are the only ones at present.

Q. 7. Have you been connected with the management of water works in the past? If so, state where?

A. Yes; Wyandotte, Kansas, and Armordale, Kansas; I was general manager of those two companies.

Q. 8. From your experience of water companies, are you able to estimate upon examination the value of a water works plant?

A. I think so.

Q. 9. Are you familiar with the rules and regulations and the rates charged by the water works companies with which you were connected, and with other water works companies?

A. Somewhat.

Q. 10. Are you familiar with the plant of the Owensboro Water Works Company in the city of Owensboro, Kentucky?

A. I recently made an examination of it.

Q. 11. When was that?

A. I think it was in the summer of this year.

Q. 12. At that time did you inform yourself in regard to the pipes, hydrants, pumps, engines and other property of the Owensboro Water Works Company?

A. I did.

Q. 13. What is your estimate as to the fair cash value of the property of the Owensboro Water Works Company at the time of that examination?

A. $225,000 to $250,000.

Q. 14. In what condition did you find the plant of the Owensboro Water Works Company?

A. In good condition.

Q. 15. What is your opinion in regard to the adequacy of the system for supplying water for domestic consumption and for fire protection in the city of Owensboro, Kentucky?

A. I think it is entirely adequate.

122 Q. 16. Do you know anything about the management of the Owensboro Water Works Company at present and for sometimes past?

A. Yes, I do.

Q. 17. What is your opinion in regard to that management?

A. I think it is a well managed property.

Q. 18. Have you read and examined the ordinance passed by the city council at the city of Owensboro on March 19th, 1900, which is complained of in this action?

A. Yes.

Q. 19. If this ordinance should be put in force, what effect would it have upon the system owned by the Owensboro Water Works Company and why?

A. It would be ruinous to the present company in my opinion on account of the rates being entirely too low and there are a good many other points which I can not recall now, which I remember was something that a company could not comply with.

Q. 20. Can you state the general custom prevalent among water companies in regard to the collection of their rates?

A. Invariably payment in advance—in all cases except meter customers, and they are collected monthly after the service has been given.

Q. 21. If the ordinance complained of in this action should prevent the Owensboro Water Works Company from collecting its domestic rates in advance, what, in your opinion, would be the effect upon the revenue of the company?

A. I think they would lose very largely, and I do not know of a single water company in this country which collects its water rent in that manner. I don't think it is practicable.

Q. 22. Can you give your reasons why you don't think this is a practical method of collecting rates?

A. On account of losing accounts—on account of bad debts, bankruptcy, and other causes. People moving from place to place, etc.

Q. 23. What sum of money would you consider necessary for the actual operating expenses of the Owensboro Water Works Company?

A. I remember of seeing their cost of operation which I considered was very low; I think $12,500 was the amount that they were paying, which, in my opinion, is as low as it can be operated.

Q. 24. What would you consider a fair estimate for the natural wear and tear upon the plant of the Owensboro Water Works Company?

123 A. About 3½ per cent.

Q. 25. In your opinion if the ordinance complained of should be put into effect, would the complainant company be able to obtain a sufficient revenue to pay its operating expenses and any return on its investment?

A. I do not.

Cross-examination by Mr. JOLLY, counsel for defendant, City of Owensboro:

Q. 26. Mr. Long, you spoke of being connected with the management of the water company at Danville, Illinois, and Defiance, Ohio, and Frankfort, Kentucky—are those companies owned substantially by the same people who own the Owensboro Water Works Company?

A. No, sir.
Q. 27. Are the stockholders partly the same?
A. In some cases.
Q. 28. I mean in Danville, Illinois?
A. In Danville, Illinois, Mrs. Miller is a stockholder.
Q. 29. Who is Mrs. Miller?

Objected to by counsel for complainant.

A. Mrs. Miller was the wife of Samuel A. Miller, and is a sister of myself, and at one time Samuel A. Miller was the owner of the Owensboro Water Company.

Excepted to by counsel for complainant.

Q. 30. Then, you are a son of Mr. Dennis Long?
A. Yes, sir.
Q. 31. Mr. Long, you say that the operating expenses of the Owensboro Water Works Company is about $12,500 a year—I wish you would give as nearly as you can the different items that enter into that total of $12,500. If you can not give it specifically, give it approximately.
A. I cannot give it specifically without taking sometime to make it up.
Q. 32. Do you mean the books at Owensboro show those items?
A. The statements which I saw at Owensboro show those items.
Q. 33. Who made those statements, do you know?
A. I think the secretary.
Q. 34. Who is that?
A. Mr. McGonigale.
Q. 35. Well. did that include interest paid on the bonds?
A. No, it would not.
Q. 36. Did it include taxes?
A. No, sir.
Q. 37. Did it include coal?
124 A. Yes, coal and salaries.
Q. 38. And wages,
A. Yes, wages.
Q. 39. Do you remember about how much salaries entered into the estimate?
A. I do not.
Q. 40. You have not that paper with you?
A. No, there were salaries of superintendent, the three or four engineers and firemen—that is about as well as I remember now. By taking the amount of $12,500, in comparison with other works I considered it particularly light.
Q. 41. Are you yourself in any way interested in the Owensboro Water Works Company as stockholder or otherwise?
A. Not at all.
Q. 42. You have relations who are?

Objected to by counsel for complainant.

A. Yes, I have relatives who are.

Excepted to by counsel for complainant.

Re-direct examination by Mr. BINGHAM, of counsel for complainant:

Q. 43. I will ask you one more question, Mr. Long. For how many years have you been interested in water works matters?
A. In water works matters, twenty or twenty-five years.

Re-cross examination by Mr. JOLLY, for defendant City of Owensboro:

Q. 44. You spoke of having been at Owensboro, when?
A. Last summer, I think it was.
Q. 455. April, wasn't it?
A. Yes, it was last April.
Q. 46. Have you been there since then?
A. No.
Q. 47. How long before last April was it that you were there?
A. Oh, it may have been several years before; I don't remember the time.
Q. 48. How long were you there in April?
A. Two days, I think.

125 THE STATE OF KENTUCKY, } ss:
Jefferson County, }

I, L. M. Price, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above named witnesses, George B. Sidelinger, Major Edward Hughes, William J. McGonigle and George J. Long, were by me first severally sworn to testify the truth, the whole truth and nothing but the truth, and that said depositions by the witnesses as above set forth were reduced to writing by me; that said depositions were duly taken by me pursuant to and at the time and place and within the hours specified in the notice attached hereto; that signatures to said depositions were waived by counsel; and that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit; that R. W. Bingham appeared as counsel for the complainant, Mr. George W. Jolly appearing for the defendant, The City of Owensboro.

In testimony whereof, I have hereunto set my hand and official seal, this the 16th day of November, 1900. My commission expires January 10, 1904.

[Seal of Notary.]

(Signed) L. M. PRICE,
N. P., J. Co., Ky.

Circuit Court of the United States, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
CITY OF OWENSBORO, KENTUCKY, ETC., Defendant.

Please take notice:

That the complainant herein will take the testimony of George J. Long, Edward Hughes, W. J. McGonigale and Charles Hermany, all of whom reside at Louisville, Kentucky, and Frank Schefold, Alfred Walker, who reside at New Albany, Ind., and G. B. Sidelinger, who resides at Danville, Illinois, and others, each and all of whom reside more than one hundred miles from the place of trial herein, and more than a hundred miles from any place where a circuit court of the United States for the district of Kentucky,
126 Owensboro division, is appointed to be held by law, at the final hearing, for the use and on behalf of the complainant, The Owensboro Water Company of Owensboro, Kentucky, before L. M. Price, a notary public in and for the city of Louisville, county of Jefferson and State of Kentucky, who is not of counsel nor interested in the cause, at the office of Bingham & Davies, at Louisville Trust Company's building (corner of 5th and Market street), Louisville, Kentucky, on Thursday, the 15th day of November, 1900, between the hours of 10 a. m. and 6 p. m., and thereafter from day to day as the taking of the depositions may be adjourned, and such testimony will be so taken in accordance with the provisions of sections 863, 864 and 865 of the Revised Statutes of the United States, and the equity rules. It being impracticable to take the deposition of said witnesses at Owensboro, Ky.

Owensboro, Kentucky, November 12th, 1900.

To the City of Owensboro, Kentucky.

BINGHAM & DAVIES,
SWEENEY, ELLIS & SWEENEY,
Complainant's Solicitors.

On the back of said notice is the following indorsement, to wit:

STATE OF KENTUCKY, *Daviess County,* } *sct:*

On the 12th day of November, 1900, I served the within notice on the City of Owensboro, (Ky.), by handing a copy of same to W. P. Small, mayor thereof, at his office in the corner of Third and St. Ann streets, in the city of Owensboro, Ky.

THOMAS N. COLEMAN.

Sworn & subscribed to before me this the 12th day of November, 1900.

DUDLEY LINDSEY,
Dep. Clerk & U. S. X Com'r.

On the back of said depositions and notice is the following indorsement, to wit:
Filed Nov. 28, 1900. Thomas Speed, clerk. By Dudley Lindsey, D. C.

And on another day, to wit, on the 28th day of November, 1900, there was filed in the clerk's office of said circuit court of the United States at Owensboro, Kentucky, the depositions of Alfred
127 Walker and Charles Hermany, taken on behalf of complainant, which were of the following words and figures, to wit:

In the Circuit Court of the United States, District of Kentucky, Owensboro Division.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, Kentucky, Complainant,
vs.
THE CITY OF OWENSBORO and Others, Defendants.

The depositions of Alfred Walker and Charles Hermany, taken, pursuant to agreement, at the office of Mess. Bingham and Davies, Fifth between Market and Jefferson, Louisville, Kentucky, Saturday, November 23rd, 1900, at 10 o'clock a. m., to be used and read on behalf of the complainant on the trial of the above styled case.

The first witness, ALFRED WALKER, being first duly sworn, and being examined by Mr. Bingham, of counsel for complainant, testified as follows:

Q. 1. Mr. Walker, please state your name, residence and occupation?
A. Alfred Walker; I reside *in* No. 223 Galt street, New Albany, Indiana; occupation, water works and gas works contractor.
Q. 2. How long have you been in the water works and gas contracting business, Mr. Walker?
A. Forty years—a little over forty years.
Q. 3. Can you state some of the places in which you have built water works and gas works?
A. In Bombay, in the East Indies, capital of the Bombay part of the East Indies; Ottawa, Canada, that is the capital of Canada; Toronto, Canada; London, St. Catherines, Sarnia, Windsor, James river and Guilph; then I put in part of the gas works in Chicago and Borden, Ind., at least, Vernon, Jasper, English, Leavenworth and I am just come down from putting in the large pipes in the Cincinnati new water works, and I have done lots of minor things

for Mr. Hermany and other people, the Bernheim distillery, Shawnee park, and the new trotting track, Fair Association, they call it, and lots of small places, not of any consequence much.

Q. 4. Have you ever examined the water works system operated by Owensboro Water Works Company?

128 A. Yes, I examined them.

Q. 5. What time was that?

A. Some two or three months ago, I don't exactly remember the day.

Q. 6. Did you make an examination of the system?

A. Yes, sir; and a thorough examination at that time.

Q. 7. In your judgment, Mr. Walker, is or is not the system of the Owensboro Water Works Company adequate for furnishing fire protection and water for domestic consumption in the city of Owensboro?

A. It is adequate for that; it is a very complete works, the most complete works I saw since I have been on this continent of the United States; the only fault that I find is that it is not filtered, that is the only fault, and that is the fault of the generality of places that take the water from the Ohio.

Q. 8. In your judgment, what is the present fair cash value of the Owensboro Water Works Company plant?

A. About $225,000 to $230,000. I don't think it can be duplicated for that to-day.

Q. 9. Are you familiar at present, Mr. Walker, with the prices of labor and material and all the things that go into the construction of a water works plant?

A. Yes, sir; I would be a poor contractor if I wasn't. I claim to be about as good an expert as there is in this country on those things.

Cross-examination by Mr. GEORGE W. JOLLY for defendant, City of Owensboro:

Q. 10. What is your age, Mr. Walker?

A. I will be seventy-three (73) the 13th of January next.

Q. 11. You were at Owensboro last April when you made an affidavit?

A. Yes, I was down there for two days.

Q. 12. What examination did you make of the water works system there?

A. Well, I went over a good portion of the town, and then I got the plans, plat of the water works, and noticed everything that is marked there, such as the valves and all connections for the utility of the works, that is in not depriving one portion of the city from water, while any repairs might have to be done in another portion, etc.

Q. 13. Where did you get this map or plan you mention?

A. I got it in the water works office; they all keep plans of their

works; they all have to; if a stranger goes there and he looks
129 at that works, and he goes to take charge of it, he has to run to that plan to find out if anything should happen to shut the water off from certain portions of the city; that's where he gets his instructions; they have them in every city.

Q. 14. You made no examination of the pipe system other than that?

A. I didn't have no excavation done to examine the state of the pipes, though I have taken pipes up that have been down fifty years, and better pipe than what I was going to put down. I done that in Toronto, I was three years putting that in.

Q. 15. Can you give me an estimate of the average cost of laying out a water works system, say of twenty miles of pipe, ranging from 15 inches down to four inches per foot?

A. Yes, I could in a very short time, but I can not do it right off-hand. I would want to know the different sizes, and then it is owing to the material. Of course, the labor is much the same everywhere, excavations and filling it, but lead and valves, etc., that is where the money is consumed; as a rule we put valves on all sizes pipe, but we don't put hydrants on sizes bigger than eight inches.

Q. 16. What would you say would be a fair estimate per foot for laying four inch pipe at Owensboro?

A. Well, now, four inch pipe at the present day—lead is worth 5 cents per pound, it takes six pounds of lead, that is thirty cents; consequently taking the digging, it would be worth about thirteen cents per foot, without furnishing pipe; to furnish labor, it depends where it is as to cost, and in a town where there is paving, it is worth a great deal more——

Q. 17. That item of cost would not go in unless the pipe was laid under paved streets?

A. If paved, it costs more money, or if it is asphalt, it costs more money; it is worth 50 cents to take pavement up and put it back again.

Q. 18. Well, now, what will four inch pipe cost per foot; you have given the cost of laying——

A. Well, now, I don't exactly know; I have no quotations from the foundries recently; it would be 26 to a little more.

Q. 19. Cents per foot?

A. 26 cents per pound—at least $26 per ton; there is 94 feet in a ton of four inch pipe.

Q. 20. Well, taking now all the cost, including the pipe, what would it be per foot?

A. It would be $1.20 a foot all told.

Q. 21. $1.20 a foot, do you say?

130 A. Yes, at the present price of pipe. The last quotations I had $32 per ton from the United States foundries.

Q. 22. I thought you were estimating pipe at $26 per ton?

A. Yes, it was at $26. I have some to sell now at $26 per ton, I don't know, but I could sell it for less; I know some of them not in the ring we call it that supplies pipe cheaper. Four inch pipe is 22

pounds per foot, six inch pipe 33, and 8 inch pipe 42, that is what we call standard weight of pipe; you can easily get the weight per ton; special casting is 3 to 3½ cents per pound.

Q. 23. How many feet did you say there was in a ton of four inch pipe?

A. Ninety-four (94).

Q. 24. How much is that per foot, counting the pipe at $26 or $27 per ton?

A. 96 feet is 2 tons, 112 pounds; no, I know it is 94 feet, but at home I have a regular schedule.

Q. 25. My question was if there are 94 feet to the ton and it costs $30 per ton, or $27 per ton, what is the cost per foot?

A. 31 cents and one over.

Q. 26. If I understood you correctly, you stated it would cost for excavation, lead and laying the pipe, etc., about 13 cents per foot. Now, the cost of the pipe is 31 cents per foot; that would make about 44c. per foot, putting the pipe in the ground, wouldn't it?

A. Yes.

Q. 27. Now take 8 inch pipe, Mr. Walker, how many feet of eight inch pipe are there to the ton?

A. Eight inch pipe, 504 pounds, that is if the regular standard; there is five pounds allowed for either over or under.

Q. 28. You mean of lead?

A. No, weight of pipe over and above, we allow five per cent. over or five per cent. under for the casting.

Q. 29. How many feet of pipe are there to the ton of eight inch pipe?

A. You see, there wouldn't be four pipe quite.

Q. 30. You say the pipe are twelve feet long?

A. Yes, twelve feet clear of the hub; that's the way they make up, and that is 3½ inches deep, that makes them 12 feet and 3½ inches actually, but in making up they reduce 3½ inches in length, that is how we measured them, what they will make up in the ditch.

Q. 31. What would be the cost of laying that pipe?

A. The cost—it is worth more for digging, it is worth about 18 cents for digging and lead, and you won't make much out of it at that.

131 Q. 32. Well, then, are there any other items of cost?

A. There is the lead and yard and hauling and fuel for melting lead and other labor; of course, there is a good deal of outlay besides the laying of them down; they all have to be examined and tested throughout before they are laid down swept out and cleaned; there is a good deal of labor attached to it; lead consumed in the joints is 1½ pound of lead to the inch in circumference of the pipe.

Q. 33. What does 8 inch pipe weigh per lineal foot?

A. Forty-two pounds per foot.

Q. 34. Well, what would be the cost of eight inch pipe at $30 a ton, per foot, wouldn't it be about 60c.?

A. Yes, a little over.

Q. 35. Can you tell the cost of laying a foot of eight inch pipe costing $30 a ton, for labor, for lead, for packing, excavation, tamping, refilling and average cartage, say for two miles, and superintendence, etc.?

A. It would be over 25c. per foot for the laying alone; we never think to tamp at all, we never take that into consideration——

Q. 36. The total cost would be about 85 or 90 cents per foot?

A. Yes, it would.

Q. 37. Now, Mr. Walker, let's take the cost of laying a twelve inch pipe, counting the pipe at $30 per ton, according to my calculation, that would be $1.07 per foot, but you make your own estimate about that—then the cost of lead, and the packing, what you call yarn, and the excavation and the refilling and the laying of the pipe, and all the labor necessary, and cartage, say two miles cartage, and the superintendence of it, and all the details of the cost—make the best estimate you can now of laying say any quantity you please, per foot?

A. Well, I might tell you before you go any further, you are just going on a straight line, whole pipe twelve feet length. Now, in every crossing of the streets, we have crosses to go in for short length—it will measure about 2 feet six inches, either that way or this way; in that we have four joints; every valve you put in you have two joints, and it only measures 8 inches, this is not being taken into consideration at all; then every hydrant you put in you have a short T pipe that makes three joints in whatever size of pipe it is; then you go from there to your hydrant, and you have two more joints; those are all extra joints in addition to what you put in a straight line, and that is all extra lead and extra labor.

Q. 38. You are anticipating now. What I asked was for you to make an estimate——

132 A. I can make an estimate of 12 inch pipe per foot; of course I know about what it is worth digging and putting in pipe, and can estimate quantity of pipe, there is eighteen pounds of lead, that is ninety (90) cents for lead on that; now you see that's what makes me say these branches and T's is all in short lengths, two feet six inches, and then you have to put extra and double and treble lead on that quantity, and you have to find out how many you are going to use.

Q. 39. How many pounds of lead do you estimate to the joint?

A. Eighteen pounds, one and one half pound to the inch.

Q. 40. That would be 90 cents per foot?

A. Yes.

Q. 41. How about hemp packing?

A. Hemp packing is worth four to five cents per pound.

Q. 42. How many pounds do you need?

A. You only need about one-fourth of a pound in a joint, four to five ounces of packing is all that is required in a joint.

—. ——.

A. About one and one-half cents, may be a little more.

Q. 43. What does it cost to excavate?

A. Excavation, of course, would be 15 to 18 cents for excavation alone, that is excavation and filling in, you know.

Q. 44. Oh, yes, excavation and refilling?

A. Yes.

Q. 45. Well, what is superintendence worth per foot?

A. You have got me in a fix that I don't know hardly how to get out of; I do my own laying and my own superintendence, so I don't pay no superintendents, I am just going as to how I do. I don't pay those people; them that has them know they are an expensive article, I reckon. I do my own work.

Q. 46. I will ask you what is the weight of a twelve inch pipe?

A. 96 pounds per foot.

Q. 47. Isn't the weight of a twelve inch pipe about 950 or 960 pounds, isn't it about 80 pounds to the foot?

A. I believe twelve inch pipe is 96 pounds.

Q. 48. Counting 12 inch pipe 12 feet long at 80 pounds to the foot, it makes 960 pounds, isn't that about it?

A. It may be, but I think it is a little more.

Q. 49. Isn't the average cost of laying a 12 inch pipe per foot, including the pipe and estimating it at $30 per ton, counting
133 in the lead and the packing and excavation and tamping and refilling and pipe laying and cartage and superintendence, the whole cost, isn't it about $1.55 per foot?

Objected to by counsel for complainant.

A. I wouldn't like to take a contract at it.

Excepted to by counsel for complainant.

Q. 50. Isn't that about the cost; I am not asking how you would contract for it; of course, you would want to make something, but isn't that about the cost?

A. I generally contract much cheaper than anybody else you could find; I am just telling you how I do; you could not get another man in this country to take a contract as cheap as I can.

Q. 51. Now, Mr. Walker, let us see if we can get at the cost per foot of laying ten inch pipe?

A. Well, ten inch pipe—there is very little difference between ten and twelve inch pipe in the size of the excavation; the excavation don't cut much figure in it; it is a little more in twelve pipe.

Q. 52. You get a little more pipe per ton?

A. Yes, we get little more pipe per ton and very little less lead.

Q. 53. And little less labor in handling?

A. In the labor there is very little difference as far as handling the pipe is concerned.

Q. 54. Isn't the average cost about $1.25 per foot?

A. I think sometimes it would be $1.50 per foot?

Q. 55. You are speaking now from the stand point of a contractor?

A. Yes.

Q. 56. I would like for you, Mr. Walker, if you are willing to do so, to state the matter from the point of actual cost, not from what you desire to make on the contract.

A. I give you the exact cost as near as I can, without even a foreman on it, but I don't think you can get anybody to go and do it cheaper than I, as I told you before, I make the lowest estimates of any man in this country.

Q. 57. Take six inch pipe, how many feet of pipe is there to the ton of six inch pipe?

A. 360 pounds, I think, to the pipe, about.

Q. 58. That is 30 pounds to the foot?

A. Yes, 33 pounds, I think is the standard weight.

Q. 59. Estimating that pipe at $30 per ton, can you tell the cost per foot, actual cost now, counting for lead and packing and excavation, and refilling and laying the pipe, and cartage and superintendence, and all the cost that enters into the laying of that pipe?

134 A. It would be worth about 24c. a foot.

Q. 60. Now, the pipe would cost what at $30 per ton, per foot? How many feet in a ton of six inch pipe?

A. 84 feet.

Q. 62. At $30 per ton, what is that per foot?

A. 35 cents and a fraction per foot, that is what the pipe would cost.

Q. 63. Mr. Walker, wouldn't the average cost of laying six inch pipe be about 66 cents per foot?

A. I wasn't including the pipe, I very seldom do.

Q. 64. I am talking about including pipe and all the labor?

A. It would be worth about 80 cents.

Q. 65. 35 cents per foot for pipe, and the balance of the labor is worth what, material and labor?

A. Then you have got your lead and all things to consider, and labor besides, and then I say if I am the contractor on straight pipe at that, I would be out of pocket considerable at that, too.

Q. 66. Now, I have here a table showing the average cost of laying water pipe from experience in the construction of thirty water works plants, of Wm. B. Rider, civil engineer, member of American Water Works Association, of South Norwalk, Conn., and I will read you a question, now based upon his answer; he says that taking the six inch pipe, counting in the weight per lineal foot, at 30 pounds and the cost per lineal foot, he puts it at 30c. Now the lead, counting at 9 pounds per joint, now the cost of hemp packing, he gives the items of it, cost per lineal foot, excavation, tamping and refilling, pipe laying, cost per lineal foot, cartage, two miles say, superintendence, and all the items, he makes it at 65 cents from actual experience. Now you speak of having constructed a number of water works plants, can you say from your actual experience that is above or below your experience?

A. It all depends on the place; if I have nothing only earth streets to go through, or macadam, I can do it cheaper than that,

provided the material hasn't gone up; but recently it has gone up, they are getting $32 per ton for all the pipe they are using here in the city. I am the very first man that put hydrants in the city of Louisville, and I have been trying to get them to do away with their engines for the last six years, and if they would let me do it I would do it for them in a very few hours.

Q. 67. Are you a civil engineer?

A. No, I am a mechanical engineer; all I know about civil
135 engineering I learned from practical experience, and I can do with my eye more than half of them can do with a level.

Q. 68. Do you know how many valves they have in Owensboro water works system?

A. I didn't count them all.

Q. 69. Do you know how many hydrants they have?

A. No, sir.

Q. 70. Do you know how many feet of four inch pipe they have?

A. Well, I did make an estimate on it, but haven't retained it in my head.

Q. 71. You don't remember the number of feet of different sizes of pipe in that system?

A. Not now, not at the present time. The way I do, when I get the map, I just look at the number of squares and the distance as marked on the squares on different streets, just take so many squares, add them together, and get the length of the average pipe.

Q. 72. Then your whole estimate was based on a map and memoranda furnished you by the Owensboro water works officials?

A. No, sir; they furnished me nothing at all.

Q. 73. Where did you get the map?

A. I got the map from the office and done the copying myself; no, I don't take no memoranda from nobody.

Q. 74. I mean memoranda of the quantities of pipe of different sizes?

A. No, I don't require to ask any questions regarding that.

Q. 75. Did the map show the sizes of the pipes?

A. The map showed the distance of each block——

Q. 76. Did it show the size of each pipe?

A. The size of each pipe is marked there.

Q. 77. That is memoranda made by the water company?

A. It is their plan, the plan of their works, then I can make my own estimate.

Q. 78. That is to say, this plan they showed you, you supposed to be a plan of their works?

A. Well, it is there for their guidance, for their employés.

Q. 79. Yes, if they showed it to you?

A. That is what I had, what is generally hanging there for the public to see.

Q. 80. It would be possible to hang another map up there, wouldn't it?

A. I don't dispute that if they wanted to be rascals, they could

substitute another if they wanted to, but I don't belong to that line of business.

136 Q. 81. No, of course not. Were you ever at Owensboro more than this one time?

A. Yes, I have been there at different times, but not particularly looking about water works; I was there since, and went through the town.

Q. 82. You never examined the water works, except this one time, did you?

A. No, I had no occasion to; I went through to put in water works for Calhoun; I made an approximate estimate for Mr. Mosely, the cashier of the bank there, and I have got to put it in for him.

Also the deposition of Mr. Charles Hermany, taken at the same time and place.

The witness, CHARLES HERMANY, being first duly sworn, and being examined by Mr. Bingham, counsel for complainant, testified as follows:

Q. 1. Please state your name, residence and occupation?

A. Charles Hermany, No. 1216 Fourth street, Louisville, Kentucky, civil engineer.

Q. 2. Have you ever had any experience or connection with the water works business, Mr. Hermany?

A. Yes.

Q. 3. How long have you been engaged in water works business?

A. Forty-three years last May, commenced right over here, two doors further north on 5th street, in the office of the Louisville Water Company, located there at that time.

Q. 4. During that time have you had any connection with water works systems in other places?

A. Yes.

Q. 5. Please state what places they are?

A. Well, Cincinnati, Ohio; Nashville, Tennessee; Memphis, Tenn.; Bowling Green, Kentucky; Frankfort, Kentucky; Indianapolis, Indiana; Milwaukee, Wisconsin; Boston, Mass.; Ft. Wayne, Ind.; that's all that occur to my mind now.

Q. 6. In what capacity have you been connected with the Louisville Water Works Company?

A. I was first assistant engineer from 1857 to 1860, and since then I have been chief engineer and superintendent.

Q. 7. In what capacity were you connected with the other towns which you mentioned?

137 A. Consulting engineer, and in some of them constructing and designing engineer.

Q. 8. Have you examined the water works system at Owensboro, Kentucky?

A. Yes.

Q. 9. Do you remember what time that was?

A. The last time was this spring, in April, if I recollect correctly.

Q. 10. Will you please state in what condition you found the water works plant at Owensboro at that time?

A. Well, generally, in a good and efficient condition; specifically, as far as I know, I stated in an affidavit made at that time.

Q. 11. Had you ever examined the plant of the Owensboro Water Works Company previous to last April?

A. Yes, sir, so far as the intake pumping station and machinery was concerned at that time—that was in 1883, I think.

Q. 12. Did you make an examination of the whole system last April?

A. No, and yes, both; I made an examination of the pumping station and the machinery; I examined their maps upon which they have represented their system of distributing pipe.

Q. 13. Will you give us an estimate, Mr. Hermany, of what you consider the fair cash value of the Owensboro water works system, as it now stands?

A. I can not tell you that from memory, I can by referring to my affidavit. From the representations made to me and information obtained on that day I estimated the system of the distributing water pipes, hydrants, gates, etc., at $120,000, the pumping station, machinery and appurtenances thereunto belonging, I estimated upon that day as worth $110,000, the total estimated value upon that day was $230,000.

Q. 14. What is your judgment, Mr. Hermany, as to the efficiency of the system operated by the Owensboro Water Works Company for fire protection and for furnishing water for domestic consumption?

A. So far as that question relates to the pumping station and machinery contained therein, considering the rate of water consumed in the city as stated to me upon that day, I should say it was good; so far as relates to the system of distributing pipe, I have no knowledge except what representations were made to me upon that day by the officials. Basing an opinion upon those representations, I should say that the system of distributing pipe was abundant
138 in capacity, if not more than abundant, so far as the ordinary water consumption is concerned. As to whether or not it is good and ample for fire protection, I have no knowledge, except to say that upon representations made to me, the fire protection should be good from the system of distributing pipe. From an inspection of the machinery, I say the fire protection is ample, from my knowledge of the system of distributing pipe as received from the officials of the company, I should say it was good.

Q. 15. Mr. Hermany, can you state the rule prevalent among water companies in regard to collecting their water rents or rates?

A. It is almost the universal rule to collect water rents at schedule rates in advance for periods varying from three months to a year in advance.

Q. 16. Can you state the reason for this rule?

A. I suppose it is the difficulty of collecting water rents if not collected in advance; the rule would not be universal unless some very strong reason existed for it being so.

Q. 17. Have you examined the ordinance passed by the city council of the city of Owensboro which is complained of in this action?

A. Only in a general way, and I don't recollect anything about it at this particular time.

Q. 18. Can you state what impression was made on your mind, or can you refresh your memory as to the rates as fixed in that ordinance, as to whether they are high or low?

A. The impression made upon me at the time I looked over them was that the company could not pay its fixed charges out of the revenues which such an ordinance would afford, but the particulars I could not remember, because I did not look into it particularly.

Cross-examination by Mr. GEORGE W. JOLLY, for the defendant, The City of Owensboro:

Q. 19. Mr. Hermany, you speak of having had some connection with the construction of the water pipes at Bowling Green, Kentucky, when was that plant constructed?

A. In 1868 or 1869, sir; probably not finished until 1870; I have forgotten now.

Q. 20. Is that plant owned by the city of Bowling Green?

A. Municipal works—has been from the beginning.

Q. 21. Did you design the distributing system there?

A. Yes, sir; I did.

139 Q. 22. Can you state in a general way the size of the pipe put into the system?

A. From three to eight inches. I think the main leading from the pumping station may have been ten inches, I am not certain now. I think it was eight inches. It was afterwards enlarged to 16 inches, I know that, and think it was originally eight inches.

Q. 23. Mr. Hermany, if you were designing a water works system at the city of Owensboro, a town of about 15,000 population, and was required by the proper authorities to construct it on a proper basis for fire protection and distribution of water to the inhabitants of the city, what size pipe and the proportions of the different sizes would you place in the system?

A. That will depend upon a great many factors, among which will be how many fire streams shall be furnished upon a single occasion, what shall be the size of them and what height to throw the water to, and then it becomes a matter of computation from there back to the pumping station; that is the plan that is the proper physical course to pursue, but seldom pursued practically. Neither municipalities or private companies usually have the funds for building works on that scale of amplitude.

Q. 24. Ought there to be any pipe in the system as large as eighteen or twenty inches?

A. I think not in a city of that size; at any rate, it would be without precedent. As an illustration of that point, at the time the water was introduced into the city of Louisville, it had a population of 69,000, and something, if my memory is correct, and its main supply pipe was only twenty inches in diameter.

Q. 25. Are you familiar with the Henderson water works system?

A. I have been there, but I am not familiar with it; I never had anything to do with the water distribution at Henderson.

Q. 26. Do you know what engineer designed it?

A. Yes, Mr. Thomas J. Whitman, of St. Louis.

Q. 27. Who constructed the plant originally?

A. That I don't know.

Q. 28. Do you know Mr. Algus, civil engineer, of Henderson?

A. Yes, I used to know him when he was a slender young man; he is a great big man now, I believe.

Q. 29. Do you know the size of their pipes.

A. I do not.

Q. 30. Does the fact that whether the pressure is furnished
140 from the engine at the station, or whether it is furnished from a reservoir have anything to do with the size of the pipes?

A. Not if the same volume of water is to be furnished; if the same volume of water is to be furnished the pipe from one wants to be just as large as from the other. The reservoir, however, is limited. It could not go beyond its own elevation, but in pumping direct, you may, by straining everything and going beyond reasonable limits put considerably more pressure on than the ordinary established pressure.

Q. 31. Mr. Hermany, could you say what proportion of six inch pipe and eight inch pipe and twelve inch pipe there ought to be in a system of distribution such as exists at Owensboro, assuming that there are about 20 miles of pipe all told?

A. Well, that depends again upon the degree of amplitude of the service. As formerly designed and built in water systems there would be a large proportion of four inch pipe; as now designed and built both the engineer and municipal authorities would rule out four inch pipe as too small, and that not less than six inch pipe should be used, and they should be so supplied by means of larger pipe that they may give the necessary supply of water as may be determined on shall be furnished. As formerly built works of that magnitude would be very largely supplied with four inch pipe, as was the case in the city of Louisville. At the present time we lay very few four inch pipes.

Q. 32. What proportion would you say there ought to be of six inch pipe?

A. Well, six inch pipe is large enough for any ordinary business street, and that proportion would necessarily predominate unless the works were distantly located. It is a problem of plans, the city geography, etc. There is no rule that applies in stating the propor-

tion of six to other lines of pipe, unless you know the location and the quantity of water to be furnished, etc.

Q. 33. Taking a town of 15,000, located on a flat plain, what would you say as to that?

A. In answer, I again say, if the works are designed with a degree of amplitude that will meet liberal requirements for fire service—then you must know the number of streams, and they should be very largely six inch pipe, but that rule very seldom applies. The question of financial resources and revenue controls those things very largely. To illustrate, you might ask me what size house should be erected for a mercantile business on Main street
141 here; that depends upon the man's capital, what he wants to invest, and the business he carries on there; there is no fixed rule.

Q. 34. Mr. Hermany, what would you estimate as the probable cost of laying 20 miles of pipe of the proper size on a sandy plain like Owensboro, arranged as to meet the wants of the public in a fair way, at the present time?

A. Well, it depends altogether upon the number of water consumers, the requirements as to volume, and the pressure under which you are to distribute the pipes—a city of that population from anywhere from one hundred to two hundred thousand dollars—according to the degree of amplitude with which you propose to serve your community, and also the quantity of water consumed; when the volume of water consumed is small, it is usual to have your capacity of distributing system small. It is a financial problem solved by those who have the matter in hand in their own way; there is no professional or mathematical way, unless you have the conditions fixed for you, under which the service shall take place.

Q. 35. You, of course, kept no memoranda, and cannot state from memory, the number of feet of pipe they have there, of different sizes, can you?

A. No, I can not; I know I made the estimate from the quantity given me that day, but I do not recollect now the number of feet of the respective sizes.

Q. 37. Is your valuation based upon the actual cost?

A. No, not upon the actual cost; upon the valuation for supplying water, its capacity of supplying water, the amplitude of pumping machinery for supplying fire pressure and also the condition under which the works have been constructed, conditions which would hold in the construction of the new works; also another consideration—the construction of the works there were, as they are in all other towns commenced upon a small scale and were added to from year to year, under which conditions the construction cost would be greater than if commenced and at once constructed and developed to the extent that the works at Owensboro are now developed.

Q. 38. Then, you do not mean to say it would cost $120,000 to duplicate their system there, your estimate doesn't mean that?

A. It means to duplicate the works upon the same conditions that

those were constructed under, the same conditions under which those works were constructed. Now, a year ago, or more, you could have reconstructed those works with pipe at $16 or $18 per ton; to-day you could not reconstruct them for less than about $24 or $25
142 per ton. When the pipes were built pipe were, I think, $60 per ton, something like that when first built. The valuation placed upon the works by me was going upon a basis of about $25 per ton. I recollect that part.

Q. 39. Well, in making this estimate, did you attach any importance to any franchise value, earnings, etc.?

A. No, sir; that had nothing to do with it; I don't know what their earning capacity is, and I don't know what the franchises were.

Q. 40. I am speaking now of the pipe system, to duplicate that to-day, what would you say it would probably cost, $100,000?

A. About, I estimated it.

Q. 41. Then, take the pumping station and machinery there, would it cost that much to duplicate it?

A. I guess more. The conditions are exceedingly unfavorable. I wouldn't to-day undertake to place new machinery of that capacity, duplicate it in its parts for the amount of money I have estimated it. I am familiar with the conditions by reason of having been connected in re-arranging the intake price in the spring of 1883 or 1884, I have forgotten which year it was now.

Q. 42. There is no filtration of water there?

A. No, sir.

Q. 43. The water is pumped directly from the river into the distributing pipes?

A. Yes.

Q. 44. Where that is the case, ought the pipes ever to be cleaned?

A. Yes, certainly.

Q. 45. How often?

A. As often as necessary; it depends upon the condition of deposits, river, silt or sand, which may accumulate in the pipes; often enough to keep them clean, of course.

Q. 46. Well, Mr. Hermany, I am trying to get at your idea as to about how often you think that should be, once a month or once in two months.

A. It might be some of your pipe lines want to be cleaned out once every three months and some of them not at all; it might be that the number of fires that take place would generate velocity enough to keep them clean. We find it necessary here to flush some pipes and not necessary to flush others, and we flush them whenever necessary.

Q. 47. You have your water filtered here?

A. Oh, no, we are constructing filters, but we have not filters.

Q. 48. You have reservoirs?

143 A. Yes.

Q. 49. The water is approximately clear, is it not?

—. ——.

Q. 50. Mr. Hermany, of course, you have a great many persons who use meters—is it customary where meters are used to collect water rentals in advance?

A. Not with us.

Q. 51. Usually the meters are permitted to run a month or more?

A. With us, a month.

Q. 52. And you collect at the end of the month when you take the indication on the meters?

A. As a general rule; but the company in order to protect itself against such consumers as are doubtful in their pay, they require a deposit to be made——

Q. 53. Or bonds?

A. No, we take no bonds; cash deposits equivalent of what is estimated a monthly consumption of water; the per cent. of meter consumers that are required to make deposits is not very great.

Q. 54. What proportion would you say of meter consumers of water pay in advance in the city of Louisville of the whole number?

A. I should judge about 94 per cent., I think from 93 to 94 per cent.

Q. 55. I beg your pardon, you don't understand—I mean to say what proportion of those who have meters pay in advance?

A. Oh, well a very small proportion—you mean that are required to make deposits—probably 3 per cent.—from 2 to 3 per cent. a very small per cent.

Q. 56. Well, an ordinance that prohibited the collection of meter rates in advance, but permitted the water company to require a deposit would not be objectionable, would it?

A. We would not so regard it.

Q. 57. There would be no danger of loss where that sort of administration took place?

A. No, that would be a business method of sufficient protection from such consumers. The fact that the Louisville Water Company has its option what plan it would adopt, not being restrained by city ordinance, and having adopted it, would imply that it is a reasonable precaution. We think so.

STATE OF KENTUCKY, }
Jefferson County, } *ss:*

I, L. M. Price, a notary public in and for the county and
144 State above named, duly commissioned and qualified, do hereby certify that the above named witnesses, Alfred Walker and Charles Hermany, were by me first severally sworn to testify the truth, the whole truth and nothing but the truth, and that said depositions by the witnesses as above set forth were reduced to writing by me; that said depositions were duly taken by me pursuant to agreement of counsel at the time and place mentioned in the caption; that signatures to said depositions were waived by

counsel; and that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit; that R. W. Bingham appeared as counsel for the complainant, Mr. Geo. W. Jolly, appearing for the defendant, The City of Owensboro.

In testimony whereof, I have hereunto set my hand and official seal this the 23rd day of November, 1900. My commission expires January 10, 1904.

[NOTARY'S SEAL.] L. M. PRICE,
N. P., J. Co., Ky.

On the back of said depositions is the following indorsement, to wit: Filed Nov. 28, 1900. Thomas Speed, clerk. By Dudley Lindsey, D. C.

And on another day, to wit, on the 5th day of December, 1900, there was filed in the clerk's office of said circuit court of the United States, at Owensboro, Kentucky, the depositions of C. C. Cooper, William Rudd, Asa Williams, Thomas Yeager, Henry Stenbing and J. Tandy Ellis, taken for complainant; which were of the following words and figures, to wit:

Circuit Court of the United States, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, Kentucky, Complainant,
vs.
CITY OF OWENSBORO, &c., Defendant.
} Depositions.

Depositions of C. C. Hooper, taken, pursuant to notice hereto attached, in the clerk's office of the circuit court of the United States, district of Kentucky, Owensboro division, in the city of Owens-
145 boro, Kentucky, on Monday, November 26th, 1900, to be used and read on behalf of the complainant on the trial of the above styled case.

The witness, C. C. HOOPER, being first duly sworn, and being examined by James J. Sweeney, of counsel for complainant, testified as follows:

Q. 1. State your age, residence and occupation?

A. My age is fifty-three; residence, Locust street, between Third and Main streets; occupation, bricklayer and contractor.

Q. 2. I will get you to state whether or not you are the same C. C. Hooper who examined the smokestack and buildings owned by the Owensboro Water Works Company, in the city of Owensboro, on the 10th day of April, 1900.

A. Yes, sir.

Q. 3. If so, what was *there* then condition?

A. Well, I went up there and took a plumb rule and plumbed the

wall and examined the buildings, and everything I found out of repair could have been fixed for twenty dollars, or twenty-five dollars. I would have done it for that money. It was in good condition then; I don't know the condition now.

Attorney for defendant did not cross-examine the witness.

(Signature waived by consent of parties.)

Also the deposition of William Rudd, taken for complainant at the same time and place.

The witness, WILLIAM RUDD, being first duly sworn, and being examined by James J. Sweeney, of counsel for complainant, testified as follows:

Q. 1. State your age, residence and occupation?
A. Forty-one, I believe; in the insurance business; and live in Owensboro, Ky.
Q. 2. How long have you been engaged in that business?
A. About twenty years.
Q. 3. Do you recollect about when the water works plant in the city of Owensboro was remodeled?
A. No, I could not state that definitely. I should judge about eight years ago; something like that.
Q. 4. You know the fact that it was remodeled?
146 A. Yes, sir.
Q. 5. What effect, if any, did the remodeling of the plant have on the insurance rates in the city of Owensboro?
A. Well, I would not know how to answer the question, except to state that the remodeling of the water plant greatly increased the efficiency of the service, and by reason of the fact of the service that has been rendered Owensboro is rated as a first-class city.
Q. 6. Do you know what per cent. the remodeling reduced the rates?
A. By reason of the present water company and its auxiliaries, the fire departments, we have a rate of about twenty-five per cent. less.
Q. 7. State whether or not, since it has been remodeled, the water company has rendered efficient service?
A. I have always regarded the service as entirely satisfactory.

Cross-examination by GEORGE W. JOLLY, attorney for defendant, City of Owensboro.

Q. 8. You spoke of the water plant being remodeled, what do you mean by that?
A. Well, the water company was bothered, I understood at the time, with what is called lack of circulation, which decreased the pressure.

Q. 9. What do you mean by remodeling; what was done, Mr. Rudd.

A. The details I could not give you, except the plant was overhauled.

Q. 10. How overhauled?

A. By increasing the circulation.

Q. 11. How was that done?

A. By putting in mains.

Q. 12. What mains did they put in?

A. I could not tell you.

Q. 13. Do you, as a fact, know that any were put in?

A. Yes, sir; I saw the work being done.

Q. 14. Where was the work being done?

A. Around town generally.

Q. 15. State some of the places where work was being done?

A. I could not tell you?

Q. 16. What do you know about the insurance rates that prevailed here in 1890?

A. Well, the town has been re-rated, and re-rated as a first class city.

Q. 17. Who did that?

147 A. The Kentucky and Tennessee Tariff Association.

Q. 18. Have other towns been re-rated?

A. Yes, sir; of course.

Q. 19. Has Henderson been re-rated in the last ten years?

A. I don't know; I would not be surprised if it has.

Q. 20. Has Paducah been re-rated in the last ten years, or do you know?

A. I could not say.

Q. 21. Are you associated with this board that re-rates towns?

A. In what way do you mean?

Q. 22. In any way?

A. I am a member of the insurance board here, the local board.

Q. 23. Are you a member of the Kentucky and Tennessee Tariff Association?

A. No, sir.

Q. 24. You say you are a member of the board?

A. Mr. Jolly, allow me to say outside, I am not a member of the Kentucky and Tennessee Tariff Association, but I am governed by their rates.

Q. 25. How many times have the rates been adjusted in Owensboro, in the last ten years?

A. I could not tell you.

Q. 26. State as nearly as you can.

A. I would not undertake it.

Q. 27. Has it been done more than once?

A. I could not state that.

Q. 28. Has it been done more than three times?

A. I could not give you any definite information. The rates are changing all the time, new buildings going up, and all that.

Q. 29. When was the present tariff rate fixed?
A. About four years ago, I think.
Q. 30. Have the rates been adjusted in Owensboro in the last two years?
A. They are adjusted from time to time as the merits of the risks suggest.
Q. 31. What facilities are maintained or supplied by the city of Owensboro for the extinguishment of fires?
A. The city of Owensboro maintains a first class fire department.
Q. 32. How many engine houses have they?
A. Two.
Q. 33. What engines have they?
A. Well, they have only one engine, that is a chemical engine. They have no use for any other engine because they have the
148 water pressure of the water company.
Q. 34. What other machines have they for the extinguishment of fire, outside of the chemical engine?
A. They have a hook and ladder company that is quite valuable. I don't know of any other machinery.
Q. 35. Have they no hose company?
A. Yes, sir; they have fire hose equipment, at both departments.
Q. 36. You say they have no fire engine?
A. The city used to have an old fire engine, I don't know whether they still own it or not.
Q. 37. How many companies do you represent as insurance agent?
A. I have nine fire insurance companies.
Q. 38. Are these companies members of the board you mentioned, the Kentucky & Tennessee board?
A. I think they are all members of the Kentucky & Tennessee board.
Q. 39. Is it possible for you to answer how many times the rates have been adjusted and re-adjusted in the city of Owensboro in the last ten years?
A. They are adjusted all the time, new buildings go up and the surroundings change, &c.
Q. 40. What do you mean when you say the rates were reduced, Mr. Rudd?
A. I mean by reason of Owensboro having the facilities for the extinguishment of fire, and the water company, it was rated as a first class city.
Q. 41. To what extent was the Kentucky & Tennessee Tariff Association influenced by the fact that the city of Owensboro maintains a first class fire department, and the fact that the Owensboro Water Works Company remodeled its pipe system?
A. What do you mean "To what extent were they influenced"?
Q. 42. In remodeling the rates, re-rating the city?
A. They rated it as a first class city by reason of it having first class fire protection.
Q. 43. Do you mean to say in your deposition that the readjust-

ment of the rates ten years ago was due alone to the fact that the water company made some improvements in its pipe system?

A. I mean to say that by reason of the fact of having a first class fire department and the services furnished by the fire department, we were rated as a first class city, in consequence of the service of the water company.

Q. 44. You are unable to state to what extent the action of
149 the Kentucky & Tennessee Tariff Association — influenced by the fact that the city of Owensboro maintains a first class fire department and the fact that the Owensboro Water Works Company improved its pipe system?

A. The fire department would — be worth a cent if it was not for the water works company.

Q. 45. I insist on you answering my question and not arguing the question with me. Now, I repeat the question. Are you able to state to what extent the action of the board in reducing the rates was influenced by the fact that the city maintains, as you say it does, a first class fire department?

A. I have answered the question.

Q. 46. You decline to make further answer?

A. I don't see how I can make my answer any more specific than I have.

Q. 47. Do you state specifically now that the insurance rates were reduced twenty-five per cent. about eight years ago by reason of the improvements made by the Owensboro Water Works Company?

A. I didn't state anything of the kind; I stated that by reason of the fire department and the water company, we had a first class town and that gave us the advantage of first class rating; and by reason of that fact we were enjoying these lower rates.

Q. 48. Do we enjoy lower rates than Henderson?

A. I don't know; I think the rates are the same.

Q. 49. Do we enjoy any lower rates than are enjoyed by the citizens of Frankfort, or any other third class city in Kentucky?

A. I don't know.

Q. 50. Do we enjoy any lower rates than the citizens of Bowling Green, another third class city, enjoys?

A. I don't know anything about Bowling Green.

Q. 51. Do you know whether the rates are lower here than at Paducah, another third class city in the State of Kentucky?

A. I don't know anything about the rates at other points.

(Signature waived by consent of parties.)

Also the deposition of Asa Williams, taken for complainant at the same time and place.

The witness, Asa Williams, being first duly sworn, and being examined by James J. Sweeney, of counsel for complainant, testified as follows:

150 Q. 1. State your age, residence and occupation, and say how long you have been engaged in your present occupation?

A. I am thirty-five years old; live in Owensboro; I am engineer of the Owensboro Water Works Company, and have been engaged there for seven years.

Q. 2. Are you familiar with the water company's system, and its pumping machines, in Owensboro, Ky.?

A. Yes, sir.

Q. —. I will get you to describe the building, the machinery therein, the mode in which — is constructed, and also describe the pipe lines; and if you have a map showing the pipe lines, and the sizes thereof, I will get you to file it, marking your name across the same for identification, and make it part of your deposition?

A. The buildings are built of brick, well shaped, probably fifty feet long and twenty-five feet wide; the ell is about twenty-five by twenty feet. The wells are constructed of steel; one of them is fifty-four feet deep, with twelve feet of concrete in the bottom—that is, in the neighborhood of twelve feet, leaving it forty-two feet deep and sixteen feet in diameter, built of three-quarter steel at the bottom, and one-half inch at the top, the joints are all, what is called general strap riveted; braced with angle irons in the middle of each sheet. The other well is thirty-five feet deep. I don't know about the concrete or what is in the bottom of it; it is thirty-five feet deep, twelve feet in diameter. From the large well there is a suction pipe twenty inches in diameter leading to the river and extends out and upwards three hundred and fifty or four hundred feet from low water mark; in extreme low water there is eighteen feet of water over this suction pipe. From the other well a fourteen inch pipe extends about the same distance, two hundred and fifty or three hundred and fifty feet from low water mark; this is twelve feet under water in extreme low water, and it is on rock bottom, and is directly in the channel; both of them are.

At the large well they have buffalo crank and fly wheel pump, and approximately four million gallons' capacity; the other pump is built by the Holly people, and the design was changed by the Buffalo Pump Company and John W. Holmes, and has a capacity of two and a quarter millions gallons. These pumps are connected separately; two sets of discharge mains laid to the intersection of Main and Triplett streets; they are so connected at the pump station that either pump can use either discharge pipe. We have

151 three boilers, sixty inches in diameter, sixteen feet long, connected with a brick smoke stack about eighty feet high—I think about that, I don't know the exact height; and I think it is four or five feet inside. We have an electric light plant of our own,

and all necessary pressure gauges, &c. The pumping system is, I consider, one of the best arranged in the country according to the size of the city; and has direct pressure. All the pipes going east and west are connected at each street intersection with pipes going direct*ed* north and south, which renders the system in such a shape that we are not called on at any time to supply the full amount of water through one pipe; but, on the contrary, each street intersection is reached throughout the business portion of the town by four pipe lines. The various tests I have made throughout the different portions of town with fire hose attached to the hydrant and pressure gauge attached thereon, I have never found more than fifteen pounds lost, except the difference in height. I mean by difference in height, at the pumping station and the place the test was made. I consider the plant as well and economically run and managed. We have not had a failure of any kind, and have not had to discontinue the supply to the city for one minute in the past seven years.

The witness files a map as part of his deposition, which is hereto attached, marked "Asa Williams."

(Here follows map marked p. 151*a*.)

MAP(S) IS/ARE TOO LARGE TO BE FILMED

Q. 4. I will ask you what the red lines on the map you have just filed indicate?

A. It indicates the different pipe lines of the system.

Q. 5. What do the figures indicate?

A. The size of the pipe line.

Q. 6. Are the pipe lines of the Owensboro Water Works Company shown accurately on the map you have filed?

A. Yes, sir.

Q. 7. Can you state approximately the number of miles of pipes in use in the city of Owensboro?

A. If I remember correctly, it is about twenty miles more or less; I don't know exactly.

Q. 8. In describing the pump station you said nothing about the roof on it. What kind of a roof is on the building?

A. The building is covered with slate and tin.

Q. 9. What was the condition of the machinery at the pumping station on the 19th day of March, 1900?

A. Why, it was in good condition outside of the necessary deterioration of the building, and that was nothing more than
152 natural; it was in good shape as new. The machinery I consider in as good shape as it was, internally, as to being able to perform its duties as it was when it was put in there.

Q. 10. Do you know and can you state the number of consumers in the city of Owensboro at that time?

A. We have fifteen hundred taps, but I think two hundred and fifty or three hundred were not in use at that time.

Q. 11. Explain what you mean by "taps"?

A. Taps are connection with the pipe in the streets that supplies each consumer.

Q. 12. Can you state the number of meters that were in use at that time?

A. Ninety-eight or one hundred.

Q. 13. Can you state the costs of these meters?

A. Just the meter alone?

Q. 14. Yes, without the cost of putting them in?

A. ⅝ inch meters, at $7.50; ¾ inch meters, at $10; one-inch meters, at $14.00.

Q. 15. The price you put on the meters does not include the cost of labor of putting them in position?

A. The cost of the meter alone; that is the cost of the meter approximately; to the best of my knowledge they will average about that.

Q. 16. Can you state the cost of operating the pumping station a year?

A. Well, I don't know that I could state the exact costs.

Q. 17. State who are employed at the pumping station?

A. Augustine, general man, does a little of everything; Wood, engineer and fireman; Hill, engineer and fireman; and myself. That is the regular force, of course we have extras at various times, but no certain persons for that.

Q. 18. State whether or not, under the system in operation by complainant company in Owensboro, it is necessary to operate the plant night and day?

A. Yes, sir.

Q. 19. State whether or not it requires additional employés?

A. It requires, that is, it requires additional force on account of not having a reservoir.

Q. 20. I mean to ask, does it require you running night and day to have two sets of hands?

A. Yes, sir.

Q. 21. Do you know the annual expenses of operating that plant?

153 A. Not exactly; I know approximately.

Q. 22. Well, state the approximate cost.

A. The cost of operation alone, I should say—what I mean by costs of operation, I do not include office expenses—it would go in the neighborhood of—excuse me, but I want to say in operation, that is to be understood as just the operation of the plant alone. I would say seven or eight thousand dollars.

Q. 23. State whether or not you examined the ordinance passed by the city of Owensboro on March 19th, 1900, and if you have examined that ordinance, state whether or not that ordinance was printed and circulated among the inhabitants of the city of Owensboro?

A. Yes, sir; I did.

Q. 24. Was it printed and circulated?

A. Yes, sir; it was printed and circulated, and I read it.

Q. 25. Have you a copy of that ordinance?

A. Yes, sir.

Q. 26. I will get you to file it and make it part of your deposition, marking your name across it to identify it?

The witness filed the copy of the ordinance, and makes in part of the deposition, and is marked "Asa Williams," and is attached hereto.

Gas and Water Ordinances.

An ordinance prescribing and fixing maximum rates for gas furnished for lighting, domestic, and other purposes in the city of Owensboro.

Be it ordained by the common council of the city of Owensboro:

SEC. 1. That after the first day of April, anno Domini nineteen hundred, it shall be unlawful for any person, firm, company and corporation engaged in the business of furnishing to any consumer or consumers thereof, in the city of Owensboro, any kind of gas, for lighting, heating, cooking or other purposes, to demand, charge, exact or receive, directly or indirectly, of or from any consumer or consumers thereof, any money, property or other thing in consid-

eration thereof, in excess or above the value of the money rates herein prescribed and specified as follows, to wit:

1. Gas for lighting or to be used for lighting, the sum of one dollar for each and every one thousand cubic feet thereof, and at this rate, and no greater rate, for any and all quantities of gas less than one thousand cubic feet.

2. Gas for heating, cooking and all purposes other than
154 lighting, the sum of seventy-five cents for each and every one thousand cubic feet thereof, and at this rate and no greater rate, for any and all quantities of gas less than one thousand cubic feet.

SEC. 2. That every person, firm, company and corporation engaged in the business of furnishing gas for lighting, heating, cooking or other purposes, in said city of Owensboro, shall furnish, free of charge, to consumers thereof, meters, that shall accurately measure the gas consumed, and keep and maintain said meters in good order and repair.

SEC. 3. That all persons, firms, companies and corporations, engaged in furnishing gas, for lighting, heating, cooking and other purposes, to persons in said city of Owensboro, shall prescribe and publish uniform and reasonable rules, fixing the time and manner of the payment of the rates herein prescribed for gas, and may require security for the payment of the same; and may by rule prescribe that if the rates herein fixed and prescribed are not paid by the consumer at the end of each month, or within five days thereafter, for the gas consumed during the month, the supply of gas may be stopped. And gas shall be furnished to any and every consumer thereof, who may be prepared to receive the same, at the rates herein prescribed, when said rules are complied with by the applicant or consumer.

SEC. 4. That every person, firm, company and corporation engaged in the business of furnishing gas for lighting, illumination, domestic and manufacturing or other purposes, shall hereafter keep and exact, complete and true account of all its incomes and gains and receipts from all and every source whatever, in detail and all the items thereof, and the dates and the totals thereof, and also an exact, complete and true account of all its expenditures showing the date and amount of each and every item of expense, cost and expenditure, and the totals thereof, and shall make and return to the common council a true and complete summary of the same, verified by the oath of the president and secretary or treasurer on the first day of January and July in each year for the preceding six months; and the books containing said accounts shall be kept at Owensboro and shall be open at any time to inspection and examination by the common council or a committee thereof appointed for the purpose, which report shall be spread upon the journal and the original filed and preserved by the city clerk in his office.

SEC. 5. That if any person, firm, company or corporation, now or hereafter engaged in furnishing any kind of gas to any
155 consumer or consumers thereof, in the city of Owensboro, shall demand, charge, exact or receive, directly or indirectly, of or

from any consumer or consumers thereof, any money, property or other thing, over and above or in excess of the rates and prices herein prescribed in the first section of this ordinance, or shall willfully neglect, fail or refuse to furnish a meter for each consumer of gas that shall accurately measure the gas that may be used by such consumer, as prescribed in the second section of this ordinance, or to furnish gas to any consumer or applicant therefor who shall demand the same and comply with the rules prescribed for the payment for gas, or shall willfully neglect, fail or refuse to furnish to the common council the report required by the fourth section of this ordinance, every such person, firm, company or corporation so offending shall, upon conviction, be fined not less than ten dollars nor more than fifty dollars for each and every offense; and for each and every demand, charge, exaction or receipt, directly or indirectly, from any person or other consumer of any money or thing in excess of the rates herein prescribed, shall constitute and be deemed a separate offense; and every willful failure and refusal to furnish a meter that will accurately measure the gas consumed by the consumer, and every willful failure and refusal to furnish gas to consumers thereof or to applicants thereof, when such applicants shall have complied with the said rules for the payment of the rates for gas, furnished, and when such consumer or applicant is prepared to receive the same, shall also be deemed and constitute a separate offense.

SEC. 6. That this ordinance shall go into full force and effect on and after the first day of April, anno Domini nineteen hundred.

An ordinance to fix and regulate rates, prices, and charges for water furnished consumers in the city of Owensboro, and for other purposes.

Be it ordained by the common council of the city of Owensboro:

SEC. 1. That hereafter every person, firm, company and corporation engaged in the business of furnishing water to consumers thereof in the city of Owensboro, shall furnish the same to consumers thereof for domestic and manufacturing purposes and uses, and for all other purposes and uses, at rates and prices not exceeding the rates
156 and prices herein named and fixed, which rates and prices are deemed reasonable and just; that is to say, water shall be furnished to all mills, laundries, saloons, distilleries, breweries, livery stables, ice factories, hotels, street railway companies and all factories and manufacturing establishments of every kind, at the following named rates, subject to the exceptions contained in section two (2) of this ordinance, to wit:

(1) In all cases where the amount of water consumed averages two thousand gallons per day, or less, estimated by the month, ten cents per thousand gallons; (2) where the daily consumption of water averages two thousand gallons, or more, and less than four thousand gallons, estimated by the month, nine cents per thousand gallons; (3) where the daily consumption of water averages four

thousand gallons or more, and less than ten thousand gallons, estimated by the month, eight cents per thousand gallons; (4) where the daily consumption of water averages ten thousand gallons or more, and less than fifteen thousand gallons, estimated by the month, seven cents per thousand gallons; (5) where the daily consumption of water averages fifteen thousand gallons or more, and less than twenty-five thousand gallons, estimated by the month, five cents per thousand gallons; (6) where the daily consumption of water averages twenty-five thousand gallons or more, and less than forty thousand gallons, estimated by the month, four cents per thousand gallons; (7) where the daily consumption of water averages forty thousand gallons of water or more, estimated by the month, three and one-half cents per thousand gallons.

That for the purpose of ascertaining and estimating accurately the quantity of water consumed by consumers described in the classification of this section and the compensation to be paid therefor, it is hereby made the duty of the persons, firm-, companies and corporations, and they shall, on request made in writing, and within thirty days after such request is made, place a water meter, in good condition and repair, in connection with the pipe or main leading into and supplying water to such consumer, and the said meter shall be kept in good repair by the person, firm, company and corporation furnishing or supplying the water to such consumer, and the said meter shall be examined and read at least monthly, for the purpose of ascertaining its condition and the quantity of water consumed.

Provided, That the minimum annual rate to be paid by all consumers of water described in the classification thereof in this
157 section, per annum, shall be twenty-four (24) dollars; and in no case shall the consumer of water who uses or consumes, annually, two hundred and forty thousand gallons of water, or less, be charged or pay more or less than twenty-four (24) dollars per annum.

SEC. 2. That water furnished by said persons, firms, companies and corporations to consumers thereof for domestic purposes and uses, where no meter has been put in or attached for ascertaining the quantity of water used, shall be furnished rates and charges not exceeding or above the following named rates and charges, per year, to wit:

(1) For each wash-stand, wherein warm and cold water, or either, is used, two dollars; (2) for each kitchen sink, wherein warm and cold water, or either, is used, two dollars; (3) for each bath tub, wherein warm and cold water, or either, is used, two dollars; (4) for each water closet and urinal, two dollars; (5) for sprinkling premises, lawn, pavement and street in front of or adjacent to the premises, per annum, two dollars and fifty cents for the first two hundred square yards or less, and one cent for each additional square yard; (6) for private dwellings, per annum, where only one tap or faucet is used, containing four rooms or less, excluding hallways, garrets, bath rooms, and water closets, two dollars, and for each additional

room, fifty cents; (7) for each cow, one dollar; for each horse, one dollar; and for each carriage, buggy and spring wagon, one dollar; (8) for filling cisterns, twenty cents for each thousand gallons.

SUB-SEC. 2. And for furnishing water for offices, banks, stores and other places than residences (above specified in this section), the rates and charges therefor shall be at rates not exceeding or above the following named rates and charges, per year, to wit:

For each wash stand, wherein warm and cold water, or either, is used, three dollars; (2) for each water closet and urinal, three dollars; (3) for each hydrant, three dollars; (4) for barber shops, for first chair, three dollars, for each additional chair, one dollar; (5) for blacksmiths, for first forge, two dollars, and for each additional forge, one dollar; (6) for plasterers, one-fourth of one per cent. per square yard; (7) for bricklayers, six cents per one thousand brick sprinkling and laying.

Provided, That any of the consumers embraced in the classification of this section may, in lieu of the above rates, require the person, firm, company or corporation furnishing the water to the consumer to attach to the pipe leading into the premises of the consumer a water meter, and it shall be the duty of the person, firm,
158 company or corporation furnishing the water to attach the said meter within thirty days after said request is made therefor in writing, and thereafter the said consumer shall be charged and shall pay for the water furnished at the minimun rate of twelve dollars per annum, and for all water consumed in excess of one hundred and twenty thousand gallons per annum, there shall be paid ten cents for each thousand gallons; but such meters shall not be attached except by the written request of the consumer.

And provided, further, That before meters are attached to or connected with the pipes or mains leading into the premises of any consumer described in the classifications in this section, by the person, firm, company or corporation supplying the water, consent of such consumer shall be first obtained, and if objection shall be made by the consumer, the mayor of the city, upon complaint by the person, firm, company or corporation furnishing the water, shall summon the consumer to appear before him, and shall hear and determine the matter and decide whether the meter shall be attached, and his decision shall be final.

If said persons, firms, companies or corporations, furnishing water, shall attach a meter in any case to the pipe leading into any consumer's premises, without his consent, or against his objection, and the water annually consumed shall not be as much as one hundred and twenty-thousand gallons, the consumer shall pay for the water actually consumed at the rate of ten cents per thousand gallons, and no more.

SEC. 3. That water rates may be collected by said persons, firms, companies and corporations from all consumers falling within the provisions of sections one and two of this ordinance, who have water meters attached, monthly, quarterly or semi-annually, at the election of said persons, firms, companies or corporations furnishing

the water, but water rates shall not be collected in advance except by voluntary consent of the consumer.

Water may be shut off from any water consumer for non-payment of water rates, or other sufficient reason, only after ten days' written notice served upon said consumer or his wife, in his absence from home, or in case of absence from premises of both husband and wife, then the said notice shall be delivered by depositing same in the Owensboro postoffice addressed to said water consumer.

SEC. 4. That if any person, firm, company or corporation shall be or become a consumer of water, and shall not be included in
159 the classifications made and contained in the second section of this ordinance, the quantity of water used or consumed by such consumer shall be ascertained by meter, and compensation made therefor at the rates and charges specified in the first section of this ordinance.

SEC. 5. That all persons, firms, companies and corporations furnishing water to consumers in the city of Owensboro, that shall have mains, pipes and conduits in the streets, alleys and public ways of the city, shall hereafter during the months of April, May, June, July, August, September, October, November in each year, cause all water mains of said persons, firms, companies and corporations to be washed and cleaned, and for this purpose shall cause all fire hydrants to be opened to their full capacity and water discharged from each for at least five minutes once in every two weeks; and during the months of December, January, February and March, shall for said purpose cause all fire hydrants to be opened to their full capacity for at least five minutes once in each and every of said months last mentioned.

SEC. 6. That hereafter all persons, firms, companies and corporations engaged in the business of furnishing water to consumers shall keep an exact, complete and true account of all its incomes, gains and receipts from all and every source whatever, in detail, giving all the items thereof and date of receipt of same, and an exact, complete and true account of all expenditures, showing date and amount of each and every item of expense, cost and expe-diture and the whole thereof; and the books containing said accounts shall be kept at Owensboro and shall be open at any time to inspection and examination by the common council or a committee thereof appointed for that purpose, and shall make and return to the common council, at the end of each six months hereafter, on the first day of January and July in each year, a true and complete summary of the same, which shall be verified by the oath of the president, secretary or treasurer of said persons, companies, firms or corporations furnishing water, and the said report shall be spread on the journal and filed and preserved by the city clerk in his office.

SEC. 7. That it shall be the duty of any person, firm, company or corporation engaged in the business of furnishing water to consumers thereof, in the city of Owensboro, through pipes, mains or conduits laid in the streets, alleys and ways of said city, to furnish water to all persons who may make application therefor in writing, and

within ten days after the date fixed in such written application, and who desire the same furnished in houses or places situated
160 on any of the streets, alleys or ways or places in the city, wherein any of the said mains, pipes or conduits are located or laid, and the said person, firm, company or corporation shall put down all necessary pipes therefor, at the expense of the person, firm, company or corporation furnishing the water, to the boundary line of the lot or premises of the applicant for water or consumer, and the remainder of the pipes, machinery or appliances necessary for conveying the water into the houses or upon the premises shall be borne by the said applicant or consumer of water.

SEC. 8. That if any person, firm, company or corporation engaged in the business of furnishing water to consumers thereof in said city of Owensboro shall demand, charge, exact or receive, directly or indirectly, of or from any consumer or consumers of water in said city, as consideration or compensation for water furnished or supplied to such consumer, any money, property or other thing of value over and above or in excess of the rates and prices for water herein named and prescribed; or shall fail or refuse for ten days, without reasonable excuse, to supply water as prescribed and required in and by section seven (7) of this ordinance; or shall fail or refuse to keep the accounts or the books required to be kept at Owensboro, or make the reports in writing to the common council, as required by section six (6) of this ordinance, such person, firm, company or corporation so offending shall be fined, upon conviction, in a sum not less than ten dollars and not exceeding fifty dollars, for each offense.

SEC. 9. This ordinance shall go into full force and effect on and after the first day of April, in the year of our Lord nineteen hundred.

The defendant objects to the filing of the alleged copy of the ordinance.

Q. 27. How do the rates in the proposed ordinance, a copy of which you have filed, compare with the rates that were in force by the water company at the time of the alleged passage of the ordinance?

A. It is from thirty to fifty per cent. less than the rates of the company.

Q. 28. Can you state and have you any idea as to what would be the revenue to the water company under that proposed ordinance if carried out?

A. It would make a difference of from thirty to fifty per cent. in it. I don't know accurately what the total revenue is, I could not give the exact figures.

Q. 29. Do you recollect the plant was remodeled under the supervision of Mr. Holmes?

161 A. Yes, sir.

Q. 30. Do you recollect the year, and can you state it?

A. I think it was about ninety; it extended through a period of some three or four years. I became acquainted with Mr. Holmes in 1890; he visited here at that time, and I think he was here previous to that time. I became acquainted with him in 1890.

Q. 31. In the reconstruction state if you can, what changes were made, or additions?

A. Why, they practically built a new works; had new pump put in, duplicated them, put them in separate wells and rendered it equivalent to two separate works with the exception of the pipe system, and the arrangement of that renders it in every equivalent a duplicate system.

Q. 32. Were the mains throughout the town changed in any respect?

A. Yes, sir.

Q. 33. On what streets, do you recollect?

A. I don't know; I was not in the employ of the company at that time, but it was on most all of the streets though; very general change throughout, I think.

Q. 34. Do you recollect the election at which the present councilmen were elected?

A. Yes, sir.

Q. 35. State whether or not any circulars were being distributed to the voters of the town on that day by any of the councilmen who were elected; if so, state the substance of the statement?

The defendant objected to the statement of the substance of anything, and insisted on the filing of the circular.

A. Yes, sir.

Q. 36. Have you one of those circulars?

A. I have none with me.

Q. 37. Have you one anywhere?

A. I think I have one, I would not be positive. I usually keep such things, but it is in my desk and I would have to go and get it.

Q. 38. How long would it take you to go and get it?

A. It would take an hour or more I guess, I would have to go through my desk where I keep such things.

Q. 39. I will get you to go and get it.

The witness left to get the circular.

The taking of depositions was adjourned at eleven o'clock a. m., November 26th, 1900, to meet at 1:30 o'clock p. m., on the same day.

[SEAL.] LUTHER LOVING,
Notary Public.

162 Met pursuant to adjournment at 1:30 o'clock p. m., on November 26th, 1900, and proceeded with the depositions of the witness, Asa Williams.

LUTHER LOVING,
Notary Public.

Examination resumed by Mr. SWEENEY, solicitor for complainant:

Q. 40. State whether or not you found the notice or circular?
A. I was not able to find it.
Q. 41. Did you make a thorough search?
A. Yes, sir.
Q. 42. Then I will ask you to state what the notice contained?
A. I don't know the exact wording of it; it was in effect that if the council was elected they pledged themselves to give the people cheaper water.

Defendant objected to the question and answer.

Q. 43. Have you any information and can you state what would be the effect if water rates were collected after the water had been furnished?

Defendant objected to the question.

A. About one out of every ten would pay for it.

Defendant excepted to the answer of the foregoing question.

Q. 44. State whether or not you ever had any connection with any other water company, if so, when and for what length of time?
A. I had charge of the pumping station at Paducah, Ky., from the 1st day of September, 1898, to the first day of January, 1899.
Q. 45. What kind of a system has Paducah?
A. They use a stand pipe.
Q. 46. State whether or not a stand pipe furnishes clear water or not?
A. Stand pipe don't furnish any better water, the simple question is of having a little surplus supply as the water is used out of the stand pipe as fast as it is pumped into it.
Q. 47. State what has been the character of the fire protection furnished by the water company since it was reconstructed?
A. I consider it first class from the fact that we have had some complaint of too much pressure than not enough.
Q. 48. Do you know and can you state the kind of pipe that was used by the company in its pipe line? Do you know the weight of the pipe?
163 A. They all run the average weight, the six inch pipe runs about 475 to 480 pounds to the twelve foot length, and the eight inch pipe about 525 to the twelve foot length. That is about the standard weight. We used standard weight pipe.
Q. 49. You do know the standard weight pipe was used?
A. Yes, sir.

Cross-examined by Mr. GEORGE W. JOLLY, solicitor for the City of Owensboro.

Q. 50. What is the largest pipe in diameter in the pipe system of the Owensboro Water Works Company?

A. Sixteen inch pipe.

Q. 51. How many feet have you of sixteen inch pipe?

A. About two hundred feet of sixteen inch pipe.

Q. 52. Where is that pipe—the sixteen inch pipe?

A. It runs from the pumping station to the intersection of Main and Triplett streets.

Q. 53. How many feet of twenty inch pipe have you?

A. About six hundred feet on the suction.

Q. 54. That is used as suction pipe from the river up to the pump, is it?

A. Yes, sir.

Q. 55. The other suction is fourteen inch pipe?

A. Yes, sir.

Q. 56. From the pumping to the point of distribution in Main and Triplett streets is two hundred feet, is it?

A. Something like that, I could not say exactly.

Q. 57. How many feet of twelve inch pipe have you in the system?

A. I could not say accurately. From Main and Triplett streets to Fifth street is twelve inch pipe.

Q. 58. Give the number of feet?

A. I will have to count the squares. I would say approximately, seven thousand feet, possibly more; that's my estimate figuring the length of the squares in my mind.

Q. 59. You have here before you a map of your pipe system. Take that map and ascertain from — the number of feet you have of twelve inch pipe?

A. Well, I will have to have a rule.

Q. 60. Well, get something to measure it.

The witness procured a rule and after making a calculation gave the following answer:

A. If I have figured it correctly, we have 5644 feet.

Q. 61. I wish you would make your calculation so it will be absolutely correct?

164 A. It would be impossible; the scale of the map will have to be absolutely correct to make my measurements accurate. A little deviation in the map would throw me off considerable, and this map is on a very small scale. A little deviation make a considerable number of feet, you know.

Q. 62. I will ask you to go over your figures again and see if the correct measurement is not 5060 feet of six inch pipe?

The witness, after going over his calculation again, made the following answer:

A. I get what I did before—5644 feet—no, 5523 the second time, and 5644 the first time.

Q. 63. Is it not 5478½ feet? You ascertain the amount *my* multiplying 145½ by 7½?

A. I get 5075, carrying out the decimals.

Q. 64. How many feet of ten inch pipe have you?

A. Well, about two hundred feet approximately.

Q. 65. How many feet have you of eight inch pipe?

A. I could not say that without going over that. I can't keep all that in my head.

Q. 66. I am asking you to state it from the map?

A. 10,423½ feet.

Q. 67. Have you no more than that? You have a little more than that, I think. You are almost accurate, but you are a little bit less than the true figures. Did you discover any errors?

A. Yes, sir; I have a little more on second count; there is a little more on St. Ann street than I had it on the first measurement, I get $\frac{1}{16}$ of an inch more.

Q. 68. Has there been any addition made to the pipe system since April 1st, last?

A. Yes, sir; there has been some pipe put in on St. Ann street from Fifth to Seventh street.

Q. 69. How many feet in St. Ann street from Fifth to Seventh street, how many feet have been put in since the 1st of February, say?

A. Four hundred feet on Allen street, too.

Q. 70. Of eight inch pipe, I was asking about?

A. Yes, sir; there is 162 feet on St. Ann street, and 400 feet on Allen street, new pipe put in since the 4th of April.

Q. 71. Since you gave your affidavit?

A. Yes, sir.

Q. 72. State the amount in the pipe system last April and state what additions have been made since then, of eight inch pipe?

A. That will be about 11062.

165 Q. 73. State the amount of six inch pipe in the system.

A. I didn't know that I would be asked to state all this or I could have got the exact number of feet from the office.

Q. 74. If you have a record that is absolutely correct, you can get that if you will. How long will it take you to get that?

A. I can get it in a few minutes.

Q. 75. Get that and use it instead of the map measurements.

After an absence of about fifteen minutes the witness returned and Mr. Jolly asked the following questions:

Q. 76. Have you a correct statement now?

A. Yes, sir; it is from the big map. We have 60,100 feet of six inch pipe.

Q. 77. How many feet of four inch pipe have you?

A. 2875 feet of four inch pipe.

Q. 78. How many feet of three inch pipe?

A. 1300 feet.

Q. 79. How many feet of two inch pipe?

A. 200 feet.

Q. 80. I will ask you to state from your record the number of feet of twelve inch pipe in the system.

A. 5600 feet.

Q. 81. How many feet of ten inch pipe?

A. I had that 200 in my calculation, but it is about 300 or 400 feet.

Q. 82. How many feet of eight inch pipe have you in the system?

A. 10750 feet.

Q. 83. How many fire hydrants have you in the system?

A. 162 or 165; I think 163 is right.

Q. 784. Is it not 161?

A. I think we put some in lately.

Q. 85. So it is now 163, you think?

A. Yes, sir.

Q. 86. How many valve boxes have you?

A. I didn't think of that, or I could have gotten that, too, while I was gone. I don't know exactly.

Q. 85. Can you state approximately?

A. I know there is over 100 and between 100 and 200.

Q. 86. Do you know how many water meters you have?

A. Yes, sir; there are 103 in operation.

Q. 87. How many taps have you?

A. We have 1627, and about 1230 in operation.

166 Q. 88. Do you know the size of these valves?

A. Yes, sir; they range from twenty inches to two inches.

Q. 89. How many twenty inch have you? More than one?

A. No; one.

Q. 90. How many of the next size?

A. Sixteen inch; I think there are four or five. Wait a minute—four sixteen inch; two fourteen inch; one twelve inch.

Q. 91. How many ten inch?

A. Two.

Q. 92. How many eighteen inch?

A. No eighteen inch.

Q. 93. How many eight inch?

A. I don't know, they are scattered all over town.

Q. 94. Can you tell how many eight inch valves you have?

A. Yes, sir; I can tell you in a few minutes. Eighteen.

Q. 95. Eighteen eight inch valves?

A. Yes, sir.

Q. 96. Can you tell how many six inch valves you have?

A. I could by going over them in my mind.

Q. 97. Can you say approximately? I will ask you if there are not 89 six inch valves?

A. I should say in that neighborhood.

Q. 98. State the number of four inch valves you have?

A. They are numerous, too.

Q. 99. Have you not about sixty?

A. I think about that. And about three, three inch valves.

Q. 100. You stated something about the employés, but you did not give the salaries. You are an employé?

A. Yes, sir.

Q. 101. What salary was paid you by the company in the year 1899?

A. Take the first of the year to the last it would average about $1200.00, less what I am allowed for my horse. They allow me fifteen dollars a month for that. During this year my year ends with the company in the middle of this year, and then during that time my salary was increased so that would make a difference that year.

Q. 102. What salary did you receive from January 1st, 1899, up to the first of July, per month?

A. I got ninety-three and some odd dollars per month, at that rate.

Q. 103. And from that time on, did you get more?

167 A. They increased me to $110 per month.

Q. 104. You are now receiving $110 per month?

A. Yes, sir.

Q. 105. And fifteen dollars per month for a horse in addition to that?

A. Yes, sir.

Q. 106. Which you furnish to the company?

A. Yes, sir.

Q. 107. What is Mr. Wood's name?

A. Dock Woods.

Q. 108. What is his position?

A. Engineer and fireman.

Q. 109. Is he properly assistant engineer?

A. Yes, sir; he stands watch.

Q. 110. What salary does he receive?

A. $50.00 per month.

Q. 111. Augustine—what is his name?

A. He is paid by the day; he never makes less than $45.00, and makes as high as $65.00 per month; minimum $45.00 per month.

Q. 112. I asked you his name?

A. George Augustine.

Q. 113. What is his duty?

A. He is general utility man; he does a little of everything.

Q. 114. Do you know how much coal was consumed last year, the year 1899?

A. I don't know the number of bushels.

Q. 115. Do you know the cost of the coal used last year?

A. About $1200.00.

Q. 116. You have no access to the actual figures, have you?

A. No, sir. I approximate the cost of coal at $1100.00 or $1200.00; I could not say exactly.

Q. 117. Either you or Mr. McGonigale is mistaken. He states it is very much less than that?

A. I don't know. We burn more at some times than others.

Q. 118. Can you state approximately the gross income of the water company for the year 1899, from water distributed to private consumers and all consumers, except what is received from the city for hydrant rentals?

A. I don't know what the amount is.

Q. 119. I asked you merely if you could state it?

A. No, sir; I could not.

Q. 120. You state that in your opinion the rates prescribed
168 by the ordinance of March 19th, 1900, are from thirty to fifty per cent. less than the company's rates; and that if these rates were enforced it would result in the reduction of the gross income of the company from water consequently of from thirty to fifty per cent. Are you sufficiently familiar with water rates and with the effect of the rates to even approximately state the effect of these rates, if put in operation?

A. The way I arrive at that conclusion, I take the water company's book and take its rates and the rates in the ordinance, and take the difference between them, and get the average of that. If I had the water company's book here I could show you.

Q. 121. You estimate that the reduction to the water company would range from thirty to fifty per cent. I will ask you, Mr. Williams, on an accurate calculation, taking the same number of consumers, you do not believe the reduction would range between 33⅓ and 40 per cent., figure it down nicely. You can take another average of it that way?

A. Yes, sir, probably they would. If I had the rate book here I could.

Q. 122. I don't ask you to make a calculation, because it would take you two or three days to do it.

—. ——.

Q. 123. Suppose the company's consumers were increased forty or fifty per cent. Would not the income of the company, assume that said city ordinance reduces the rates from thirty to forty per cent. be as great under the city ordinance as it is under the company's rates?

A. You can't get the increase.

Q. 124. But assuming that you could?

A. I don't think it would. Your running expenses would be greater.

Q. 125. Don't you claim to have pump capacity to supply a much larger consumption than you now have?

A. Yes, sir.

Q. 126. You have 1200 taps in operation. What is the average daily consumption of water in Owensboro?

A. One million and a quarter gallons.

Q. 127. And you have a pumping capacity of about four million gallons?

A. Yes, sir.

Q. 128. Could you not supply the full capacity at the same cost to the company as the quantity you now supply?

A. No, sir; in the first place it takes more coal, more oil and more labor, and the expenses are bound to increase with the increase of pumping capacity.

169 Q. 129. It is not a matter of information with you from your long connection with the company, that the company's gross revenues for the year 1899 were approximately $32,000.00.

A. No, sir I don't know what their gross income was.

Q. 130. I am asking you if that is not your information?

A. I was never informed about it. I got the auditor's statement on my own account, wrote to Frankfort and got it on my own satisfaction; no person of the company has ever told me of the income; I have never known and never asked.

Q. 131. I have been informed that you stated the gross income for the year 1899, was $31,000.00 or $32,000.00, and I thought you had that information?

A. No, sir; I didn't have the information.

Q. 132. Is it not your information that the company's income for the year 1899 was approximately $31,000.00 or $32,000.00?

A. I got my information from the auditor's statement; that is all I had to go by.

Q. 133. The auditor's statement was made out September 15th, 1899, and it is a part of this record in this case, it shows the income of the company for the year 1899, and I show it to you and ask you if that corresponds with your information?

A. If I made any statement that is what it was. I don't remember making any statement; but that is all I had to go on. I got that statement on my own account of my own free will, I wanted to see what it was.

Q. 134. Is it not a fact that the officers of the company, to your personal knowledge made a calculation as to the effect of this ordinance, and ascertained from such calculation that the reduction would be equivalent to about one-third?

A. Yes.

Q. 135. Assuming that the company receives $7400.00 per annum for the rent of fire hydrants, and deducting that from the company's income as reported, and taking off one-third for the reduction proposed by the city's rates what have you left?

A. About $15,000.00.

Q. 136. About $17,000.00, don't you?

A. No; 29, 7 off, and 7 off that leaves 15.

Q. 137. If the company's income was approximately $32,000.00, then deducting the hydrant rentals and deducting one-third, you would have about $17,000.00?

A. Yes, sir; that way you would.

170 Q. 138. You have stated the salaries or wages received by yourself, Augustine and Woods. What does the waste and oil and repairs about the machinery amount to per annum?

A. Oil, $150.00 per year; waste, $35.00 per year; and well, it depends on what the repairs are, such as packing for the large pump costs $18.00, and for the small one $16.00. Every pump filling put in costs one dollar and ten cents. We had a job Saturday that cost us over $50.00. Last spring we picked up a lot of sand, and that sand cost us $127.00—the effect of it.

Q. 139. Take one year with another, what do these repairs amount to?

A. They run from $2000.00 to $3500.00 per year, on an average; some years it may be more and some years it may be less.

Q. 140. What do you include in these repairs? I don't speak of additions to the work, I mean such work about the machinery as is necessary to keep it in running order?

A. When the intake pipe gets out of order it costs $50.00 a day for a diver alone.

Q. 141. You may not have to do that for a year or two?

A. Then, there is the wear and tear on the meters.

Q. 142. I am speaking of repairs done about the machinery to keep it in ordinary running order?

A. In my estimate of the operating expenses I include wear and tear on the meters, and what is called operating expenses. I don't keep the books or anything like that, I have to approximate it.

Q. 143. What do you estimate the wear and tear to be per annum?

A. On the machines?

Q. 144. On the water works plant?

A. The whole thing, from $2000.00 to $3500.00.

Q. 145. That includes the pumping station and the pipe system?

A. Not less than that.

Q. 146. You say in making your estimate of repairs and things of that sort you include wear and tear, and you say it would cost from $2000.00 to $3500.00 per annum?

A. Yes, sir.

Q. 147. Do you know what is paid out for clerk hire?

A. No, sir.

Q. 148. Nor for office rent?

A. No, sir.

Q. 149. Nor for stationery, printing, postage, &c.?

171 A. No, sir.

Q. 150. Well, Mr. Williams, have you had any experience in laying pipe?

A. Only what I have had at the water works.

Q. 151. What is pipe worth per ton now?

A. $27.50 per ton.

Q. 152. What was it worth last year?

A. $30.00, I think.

Q. 153. What was it worth per ton the year before that?

A. Last year we paid $33 per ton for some pipe.

Q. 154. That's 1899, but the previous year it was cheaper than that, was it not?

A. I don't remember exactly, but I think it was about $24.00 or $25.00 per ton.

Q. 155. And the year before that, what was it worth?

A. It was cheaper than that; it was $17.00 or $18.00. Pipe was way down before they got up this trust.

Q. 156. I believe you say you were not employed by the company eight or nine years ago when there was some reconstruction of the plant?

A. No, sir; unless assisting Mr. Holmes in making tests and such things as that—I was employed to that extent.

(Signature waived by consent of parties.)

Also the deposition of Thomas Yeager, taken for complainant at the same time and place.

The witness THOMAS YEAGER, being first duly sworn, and being examined by Mr. James J. Sweeney, of counsel for complainant, testifies as follows:

Q. 1. State your age, residence and occupation, and whether or not you are the same Thomas Yeager who made affidavit here in April last?

A. Yes, sir; I made an affidavit.

Q. 2. State whether or not you are the same man who made that affidavit I referred to?

A. Yes, sir.

Q. 3. State what connection at any time you had with the fire department of the city of Owensboro, if any, and state the years, and what position you held?

A. I was chief of the fire department for four years up to this year. I have been connected with the fire department off and on since 1872; I have held different positions.

172 Q. 4. Do you recollect of the fact of the changing the pipe system in the city of Owensboro and putting in new pumping machinery at the water works?

A. Yes, sir; I remember it; but don't remember the year.

Q. 5. Since that change was made state what has been the efficiency of the water works for the purpose of extinguishment of fires?

A. It was all that we required; it was as good pressure as we needed or wanted.

Mr. Jolly, Counsel for city of Owensboro, did not cross-examine the witness.

(Signature waived by consent of parties.)

The further taking of depositions was adjourned at 3:30 o'clock p. m., Monday, November 26th, 1900, to meet at 9:30 o'clock a. m., Tuesday, November 27th, 1900, and proceed with the depositions.

[SEAL.] (Signed) LUTHER LOVING,
Notary Public.

Met pursuant to adjournment at 9:30 o'clock a. m., Tuesday, November 27th, 1900, and proceeded with the depositions.

[SEAL.] (Signed) LUTHER LOVING,
Notary Public.

Also the deposition of Mr. Henry Steubing, taken for complainant at the same place, on the 27th day of November, 1900.

The witness Mr. HENRY STEUBING, being first duly sworn and being examined by Mr. James J. Sweeney, of counsel for complainant, testified as follows:

Q. 1. State your age, residence and occupation?

A. Age, 50; civil engineer, and I am employed with the water works at Evansville, Ind.

Q. 2. State how long you have been a civil engineer, and what experience have you had in the construction of water works and similar plants?

A. I have been a practicing engineer—civil engineer, since 1874. I have been in the water works business from 1876 until 1881, from 1886 until 1888, and from 1891 until now. Now, in the meantime I have been a civil engineer and similar and other purposes.

173 Q. 3. State whether or not you have ever built or assisted in building or planning a water works system, if so, where?

A. I have assisted in building water works systems at Louisville, Ky., Maysville, Ky., and Evansville, Ind.

Q. 4. How long have you been in Evansville, Ind.?

A. Near three years.

Q. 5. In what business are you engaged at present?

A. I am inspector of the Evansville water works, in charge of all the works except the pumping machinery.

Q. 6. Are you the same Henry Steubing who made affidavit herein on the fourth day of April, 1900?

A. I am.

Q. 7. State whether or not at that time you made any examination of the Owensboro Water Works Company's plant in the city of Owensboro, and if so, state what examination you made?

A. I made a careful examination of the whole Owensboro plant, going over all of the engine house, boiler house, machinery, &c., and went over the map of the pipe system here in Owensboro.

Q. 8. State what was the fair cash value of the water works plant in the city of Owensboro on that day?

A. As much as I remember my estimate of the cash value of the Owensboro plant at that time was $257,000.00.

Q. 9. State what kind of a system it is, that is with reference to its efficiency to furnish fire protection and supply water to the citizens of Owensboro?

A. I consider it by past experience to be a very fair system for supplying water direct from the Ohio river, as fair as there is in the State.

Q. 10. State whether or not you examined the ordinance passed by the city of Owensboro on March 19th, 1900, when you were here and made an examination of the Owensboro water works plant?

A. I did.

Q. 11. State what per cent, if any, in your judgment, the loss would be to a water company in collecting its rents, its water rates, after the water had been furnished, and not in advance?

The defendant objected to the foregoing question.

A. Why, I think fully thirty per cent. loss.

Q. 12. What is the rule with reference to the collection of water rates throughout the country, that is to say, whether collected in advance or after the water has been furnished?

The defendant objected to the foregoing question.

174 A. The use of all water works, private or municipal, that I know of, or ever heard of, collect their rents in advance.

Q. 13. State whether or not the water works company in Evansville is owned by the city or a private corporation?

A. The water works company in Evansville is owned by the city.

Q. 14. State how the rates in the proposed ordinance of March 19th, 1900, with the rates at Evansville, whether higher or lower rates are collected by the city of Evansville?

The defendant objected to the foregoing question.

A. I would have to look over it, I don't remember the rates of your ordinance now.

Q. 15. I hand you a copy of the ordinance to examine, and ask you to state after you have examined it whether the rate at Evansville is higher or lower than the rate fixed in that ordinance?

A. They are lower rates than collected by the city of Evansville.

Q. 16. State what per cent. the pumping machinery, boilers, engines, &c., will depreciate owing to use, or in other words what per cent. will it tax to keep the machinery in good condition?

A. That is very little in the beginning, but it is increased afterwards. I should say about four per cent.

Cross-examined by Mr. GEORGE W. JOLLY, counsel for City of Owensboro:

Q. 17. Did you mean to say Mr. Steubing, that the natural wear and tear in the machinery of the Owensboro Water Works Company, at present, is equivalent to four cent.?

A. It may be more than that now, Mr. Jolly. I say it is very little in the beginning of a new plant, but after a plant gets old, the older it gets the wear and tear is more; I mean four per cent. would be an average.

Q. 18. Do you mean, Mr. Steubing, that there is four per cent. depreciation in the pipe system, too?

A. The question asked by Mr. Sweeney did not include the pipe

system at all, it was only on the engines, boilers and pumps, &c., it was not on the pipe system.

Q. 20. You mean in what you have heretofore said with reference to the natural depreciation that the pumps and machinery depreciate four per cent., do you?

A. I did; at that time I had not thought of the pipe system; I did not think about it at the time.

175 Q. 21. How old are the engines, pumps and boilers at the pumping station?

A. You mean here?

Q. 22. Yes, sir. At Owensboro Water Works Company?

A. I don't know. They have the appearance, however, of being several years in use.

Q. 23. Now, is the depreciation greater on the pumps than it is on the engines, or less?

A. I know from my experience that a pump will play out quicker than an engine will.

Q. 24. You gave an estimate of the value of the Owensboro water works system?

A. Yes, sir.

Q. 26. Fixing the value at about $257,000.00?

A. Yes, sir.

Q. 27. Did you make an examination of their pipe system?

A. Yes, sir.

Q. 28. What examination did you make of it, Mr. Steubing?

A. I looked over the map, and I know by whom the pipes were furnished, and I know about the standard weight of the several kinds of pipe by table thereof, and what the pipe is worth, or that it was worth at that time.

Q. 29. Was your estimate of the value of the pipe system made at the present prices for pipe?

A. From the prices at that time?

Q. 30. For the year 1900?

A. Yes, sir.

Q. 31. Did you make any deduction from the value on account of wear and tear?

A. No, sir.

Q. 32. Well, what did you estimate the pipe at per ton last April?

A. As near as I can remember, about $30.00 per ton.

Q. 33. Do you know the quantity of pipe of the different sizes they have in the system?

A. The quantity?

Q. 34. Yes, in feet?

A. No, sir; I do not know now; I did then, of course.

Q. 35. Have you laid water pipe yourself as contractor or builder of water works?

A. Yes, sir; a good many miles.

Q. 36. Can you give an estimate of the cost of laying—well, say 5500 feet of 12 inch pipe, in the streets at Owensboro, per foot?

A. You have no rock here, have you?

176 Q. 38. No, sir.

Q. 39. You got sandy soil?

Q. 40. Yes, sir; sandy soil.

A. How is the work to be done, in what way—by daily labor?

Q. 41. I spoke of the actual cost of laying the pipe. I mean for you to include, take twelve inch pipe—twelve inch pipe would weigh about eighty pounds per foot—count it at $30.00 per ton; count lead—cost per lineal foot for lead, hemp, packing, cost per foot for excavating and refilling—cost of cartage—say, an average of two miles, cost of superintendent. Then the whole cost of that per lineal foot—what would you estimate it to be? Mr. Steubing, I have a table here of the cost of the pipe, the weight, and the cost per foot of putting it down, you may look at it if you wish?

A. I think this table gives some of the pipe a little light—six inch pipe, 1500 is a little below standard weight.

Q. 42. You see the different items there under the different headings; it is not very plainly written, but you can make it out. Now this table, look at it and say whether it is accurate in your opinion as to twelve inch pipe? All these different items if expense are estimated per lineal foot and then it runs out the total?

A. You mean to lay twelve inch pipe in dirt street?

Q. 43. Yes, sir; such as we have here in Owensboro?

A. You have no brick, asphalt, or macadamized streets?

Q. 44. No, no; just dirt street?

A. In my opinion is that is could not be done for less than $1.60.

Q. 45. Mr. Steubing, I have a table here purporting to be made by Mr. William R. Reider, civil engineer, late of the State board of engineers, and member of American Water Works Association, of South Newark, New Jersey, and he says the average cost of laying water pipes, from the experience in the construction of thirty water works plants by him, the prices given in this table is the cost for laying the different sizes of pipe. I will ask you — examine this table and say whether or not your own experience corresponds with the prices shown here? I mean, of course, the total cost per lineal foot of laying pipe of the above sizes. Now, he says, or rather this table says, that the cost of laying four inch pipe per lineal foot, counting the pipe at $30.00 per ton, is this amount here; and the cost of laying twelve inch pipe, and the cost of lead, and the

177 cost of hemp packing, and the cost of excavating, drayage, refilling, pipe-laying, and cartage, say a distance of two miles on an average, and the superintendent and the cost of laying pipe, including cost of pipe—take twelve inch pipe, he puts it in at $1.56½ per lineal foot. State whether or not that corresponds with your experience, are these figures approximately accurate and correct, in your opinion?

A. The figures, insofar as made, are a very fair average, with the exception of the pipe; there is a little difference in the weight of the pipe, the pipe is made a little heavier than given in this table,

and that would make it cost a little more, and then the cost of labor has advanced.

Q. 46. He states the cost of laying four inch pipe per lineal foot at $.47; and the cost of laying six inch pipe per lineal foot at $.60; and the cost of laying eight inch pipe at $.93, or approximately $.95 per lineal foot; the cost of laying ten inch pipe at $1.26 per lineal foot; the cost of laying sixteen inch pipe at $2.30 per lineal foot; the cost of laying eighteen inch pipe at $2.70 per lineal foot; the cost of laying twenty-four inch pipe at $4.20 per lineal foot. I would be obliged to you if you would look over this table and say whether or not the prices here given correspond approximately with your own experience in this work?

A. Why, the standard rates of pipe given on that table there are less than the present rates, Mr. Jolly. Four inch pipe instead of 240 is 264; the six inch pipe instead of 360 is 396 now; and the sixteen inch pipe is properly 1560 now, I believe, I don't remember now what the standard eight and ten inch are, which will increase the cost of the price given on that table there, and the cost of labor has increased, and is increasing all the time, and therefore, I think the prices given on that table are about from 3½ to 5 per cent. too light.

Q. 47. But Mr. Steubing, if you estimate the cost of the pipe at $30.00 per ton, can the fact that there is a difference in the weight of the pipe at this time make any difference in the cost of putting it down—would it not be about the same?

A. No, it would be more.

Q. 48. In other words, Mr. Steubing, if you should take the cost of pipe herein given, at $30.00 per gross ton, though the pipe may be a little heavier than that given in this table, would it necessarily increase the cost per lineal foot of laying it?

A. It would necessarily increase the cost of laying it; the
178 total cost per lineal foot would be increased, would it not, Mr. Jolly? The cost of laying it would, of course, increase?

Q. 49. Your estimate is that this table, probably how many per cent. too light?

A. From 3½ to 5 per cent.

Q. 50. Now, Mr. Steubing, estimating, which is a fact, that the water plant at Owensboro, I mean the pipe—was laid here without having to tear up asphaltum or brick, or macadamized streets, and in sandy soil, without any rock in the soil, would that decrease the cost of laying the pipe? Now, this table was made by a man who has been laying pipe in the northern part of the country where there is a good deal of rock, and I presume it requires a great deal more labor in this case than in soil where there is no rock?

A. I don't think so; I have been laying pipe in Evansville and the soil is about the same there as here. You will probably have to go some deeper in this soil than you would in rock, from three to four inches any way in laying twelve inch pipe.

Q. 51. How, have you had occasion recently to put in any pumps,

or engines, similar to those in use at the Owensboro water works plant?

A. No, sir.

Q. 52. Are you familiar with the prices of such machinery?

A. I used to be familiar with them, but the prices have been going up so, I don't know how they are now. I know that machinery is considerably higher now than it used to be. The present engines we bought four years ago in Evansville, you could not buy them now for fifty per cent. more.

Q. 53. Mr. Steubing, you say in speaking of the collection of water rents—what is the custom in regard to the collection of water rates where meters are attached?

A. They collect them, generally, monthly.

Q. 54. I believe you say you have made some comparison of the present rates fixed by the ordinance passed by the common council of the city of Owensboro, on March 19th, 1900, with the rates charged at Evansville?

A. Yes. sir.

Q. 55. You have no copy of the Evansville rates here with you have you?

A. I have them all in my head, Mr. Jolly; I have been working with them for the last six months. Yes, I have to have them in a book, pasted in a book I always carry with me; they are the old rates; the new rates are a little bit lower.

179 Q. 56. You have been asked some questions which assumed that there was some provision in this ordinance that prevents the collection of rates in advance. Let us assume that there are no provisions in this ordinance that prevent the collection of the rates in advance, except where meters are used, then would there be any loss?

A. Yes; there is always a loss.

Q. 57. No more would ordinarily occur if all the rates were made collectible in advance—would there be any more loss than the ordinary percentage of loss which attaches ordinarily?

A. No, sir.

Q. 57. Now, Mr Steubing, the section of the ordinance I presume referred to, provides "that water rates, where meters are attached, may be collected monthly, quarterly, or semi-annually," but you will see there is no provision that provides that the water company, if required to and disposed to, can not collect the rates in advance, or take security for the rates?

A. You mean the city water works?

A. —. I mean in this ordinance. The effect of the third section is to permit water rates where meters are attached to be collected at the end of each month, or at the end of each quarter, or semi-annually, but there is no provision that prevents the water company from exacting of its patrons who have meters attached to take security in the way of bond, and if that is a correct construction of the ordinance there would not necessarily be any loss on that ground, would there? There is nothing in the ordinance that would pre-

vent the company from making any new rules to secure the payment of the rates, so they do not conflict with the ordinance?

A. No, sir.

Q. 59. Assuming that the water company was built twenty years ago, Mr. Steubing, and has been in operation for that period of time, and has during that period had additions made from time to time in the way of extension of its pipe system, and the purchase of new machinery, to keep the machinery in repair and all of that, what would you say ought to be deducted for wear and tear for that period of time, on the plant as a whole. You may answer, and state what you would say the average annual depreciation would be, and then state the gross depreciation up to this time?

A. That is a question that is hard to answer, Mr. Jolly. It would depend whether the proper repairs were made at the right time, and which were made, to keep the plant up. I know of plants
180 that have depreciated in value considerable, and the engines, pumps and boilers are played out, and I know of plants that have been taken care of and kept up and are in as good condition as they ever were. That is the case in the city of Louisville; the pumps in that plant are pretty near as good now as they were when Mr. Long put them in there. Now, there is the Evansville plant, that has depreciated 75 per cent. in value. To answer that definitely as you want it answered, Mr. Jolly, would be almost impossible.

Q. 60. Well, of course, Mr. Steubing, if you can not give an answer satisfactory to yourself, you may let it go.

A. That is the only answer I could give, not having lived here, and not having known the plant and been familiar with it. If I had lived here and had known and been familiar with it, all along, I could give a more definite answer. That is the best answer I could give.

Q. 61. Could you, Mr. Steubing, say from what you have seen of the plant here and what you know of it, state what you think would be a fair estimate for the depreciation in value of the plant, from the beginning down to the present time?

A. I don't think there has been any depreciation, Mr. Jolly; I think it is as valuable as it was when constructed.

Q. 62. You think the plant as valuable to-day as when constructed?

A. Yes, sir.

Q. 63. In arriving at this conclusion or estimate of $257,000.00, you gave no details at all. Could you separate the items that are included in that total?

A. I did at that time; I could not now without going over the whole thing. That was an actual calculation of the whole thing, engines, boilers, buildings, pumps and all—what it would take to build it.

Q. 64. You have spoken of having constructed, I believe, at the city of Maysville, a water plant?

A. Yes, sir.

Q. 65. What year was that?

A. In 1880 and 1881.

Q. 66. Do you remember what the cost of that plant was?

A. I think it was $150,000.00.

Q. 67. That plant was built by the city of Maysville?

A. No, sir; by a company. Some Maysville gentlemen, and some Louisville gentlemen.

Re-direct examination by Mr. SWEENEY:

Q. 68. In answer to some one of Mr. Jolly's questions you
181 stated there was always a loss where rents were collected after the water was furnished?

A. Yes, sir.

Q. 69. I will get you to state if you can what per cent. of loss occurs by reason of the collection of rents after the water has been furnished?

A. About 2½ to 3 per cent.

Q. 70. I will get you to examine the ordinance heretofore filed commencing with the words "provided," on page 10, in subsec. 2, and get you to state whether or not that is a reasonable or unreasonable stipulation?

A. I think it is out of reason, for a private consumer—ordinary private consumer may require a meter put in and his rent will not amount to near the costs of the meter. You have to go to the expense of putting in a meter, and have to keep the books on it, and then it gets out of fix once and a while and it has to be repaired. The ordinary consumer does not use as much water as he thinks he does.

(Signature waived by consent of parties.)

The further taking of depositions was adjourned at 11:30 o'clock a. m., Tuesday, November 27th, 1900, to meet at 2 p. m. on the same day and proceed with the depositions.

[SEAL.] (Signed) LUTHER LOVING,
Notary Public.

Met pursuant to adjournment at 2 o'clock p. m., November 27th, 1900, and proceeded with the depositions.

(Signed) LUTHER LOVING,
Notary Public.

Also the deposition of J. Tandy Ellis, taken for complainant at the same place, on Tuesday, November 27th, 1900.

The witness, J. TANDY ELLIS, being first duly sworn and being examined by Mr. James J. Sweeney, testified as follows:

Q. 1. State your age, residence and occupation and what connection, if any, you have with the Owensboro Water Works Company, and how long you have been so engaged.

A. I am thirty-two years old; reside in Owensboro; I am vice-president of the Owensboro Water Works Company.

182 Q. 2. Who was the president of the Owensboro Water Works Company in March, 1900?

A. De Long Miller.

Q. 3. Where was De Long Miller in March, 1900?

A. At Asheville, North Carolina.

Q. 4. State what notice or knowledge you had of the passage of the ordinance by the city council of the city of Owensboro, Ky., of date March 19th, 1900?

A. None at all, except what I saw in the papers.

Cross-examination by Mr. GEO. W. JOLLY:

Q. 5. You saw the ordinance published in the papers?

A. Yes, sir.

Q. 6. You knew the ordinance was pending?

A. Yes, sir.

Q. 7. Did you make any request at any time of the council to be heard on the matter in any way?

A. None whatever.

Q. 8. Did you offer to the city or any of its officers any information on the matter?

A. Not at that time; it was not asked of us.

Q. 9. Neither did any member of the company as far you know request to have a hearing of the matter, did they?

A. Not that I know of.

Q. 10. When were you elected vice president of the Owensboro Water Works Company?

A. In January, last.

Q. 11. When did you become engaged for the Owensboro Water Works Company?

A. In January, the latter part of January.

Q. 12. As an officer?

A. Yes, sir.

Q. 13. Prior to that time what stock had you held in the company?

A. I had held none.

Q. 14. What amount of stock do you hold now in the water company?

A. I hold none directly.

Q. 15. Do you hold some indirectly?

A. I can't say that I do indirectly, just now.

Q. 16. As vice president what salary do you receive, if any?

A. My salary now is $100 per month at this time.

Q. 17. What has it been heretofore?

A. It was more than that when I began; it was $150.00 and the company cut down expenses and my salary has been reduced.

183 Q. 18. Are you a civil engineer?

A. I am not.

Q. 19. Have you heretofore had charge of a water works plant?

A. No, sir.

Q. 20. What are your duties as vice president of the Owensboro Water Works Company?

A. As general manager of the company, and to promote the interest of the water works company in every way I can.

(Signature waived by consent of parties.)

STATE OF KENTUCKY, *County of Daviess,* } *sct:*

I, Luther Loving, notary public in and for the county and State above mentioned, duly commissioned and sworn, do hereby certify that the witnesses, C. C. Hooper, William Rudd, Asa Williams, Thomas Yeager, Henry Steubing and J. Tandy Ellis, were by me severally sworn to testify the truth, the whole truth and nothing but the truth; and that said depositions by the witnesses above set forth were reduced to writing by me; and that said depositions were duly taken by me pursuant to agreement and notice filed in the clerk's office of this court at the times and place herein specified; that the signatures of said witnesses to said depositions were waived by counsel; and that I am not counsel, attorney or relative of either party, or otherwise interested in this suit; that James J. Sweeney, Esq., appeared as counsel for complainant, and George W. Jolly, Esq., appeared for the defendant, The City of Owensboro.

In testimony whereof, I have hereunto set my hand and official seal this 1st day of December, 1900.

[SEAL.] (Signed) LUTHER LOVING,
Notary Public.

My commission expires March 23, 1904.

STATE OF KENTUCKY, *County of Daviess,* } *sct:*

I, Luther Loving, notary public in and for the county and State above mentioned, duly commissioned and sworn, do hereby certify that the exhibits filed with the deposition of Asa Williams, which is a copy of the "Gas and Water Ordinances of the City of
181 Owensboro," is the same exhibit mentioned and referred to on page 13 in answer to question No. 26, of the deposition of Asa Williams, and is marked "Asa Williams" for identification.

And as notary public as aforesaid, do hereby certify that the further exhibit filed with the deposition of Asa Williams which is a map of the city of Owensboro showing the system of pipe of the Owensboro Water Works Company by red lines marked thereon, is the same exhibit mentioned and referred to on page 10, in answer to question No. 3, of the deposition of Asa Williams, and is marked "Asa Williams" for identification.

Given under my hand and seal of office this the 1st day of December, 1900.

[SEAL.] (Signed) LUTHER LOVING,
Notary Public.

Commission expires March 23, 1904.

Circuit Court of the United States for the District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
CITY OF OWENSBORO, &c., Defendants.

The defendant will take notice that the complainant, The Owensboro Water Works Company, pursuant to the written stipulation of the 11th of August, 1900, will examine witnesses in the above entitled cause under the sixty-seventh rule in equity as amended (and under the 68 rule), before Luther Loving, a notary public, at the office of the clerk of the United States in the city of Owensboro, Ky., on Monday, the 26th day of November, 1900, beginning said examination at ten o'clock on said day and continuing from day to day until completed.

The witnesses to be examined are as follows: H. P. Martin, J. T. Ellis, William Rudd, Rheese Brannon, Asa Williams, W. I. Thompson, James H. Taylor, Henry Steubing, Thomas Yeager, C. C. Hooper.

(Signed) SWEENEY, ELLIS & SWEENEY,
Solicitors for Complainant.

To G. W. Jolly, attorney for defendants.

STATE OF KENTUCKY, } *sct:*
County of Daviess, }

Affiant, Clarence M. Finn, says that he served the within
185 notice on the City of Owensboro, by delivering to Geo. W. Jolly, a true copy of the same, this the 22nd day of November, 1900.

(Signed) CLARENCE M. FINN.

Subscribed and sworn to before me this the 22nd day of November, 1900.

(Signed) DUDLEY LINDSEY,
Dep. Clk & U. S. Com.

On the back of said depositions and notice is the following indorsement, to wit: Filed December 5th, 1900. Thomas Speed, clerk. By Dudley Lindsey, D. C.

And on another day, to wit, on the 11th day of December, 1900, there was filed in the clerk's office of said circuit court of the United States at Owensboro, Kentucky, the deposition of Owen Ford, taken for complainant, which was of the following words and figures, to wit:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

The President of the United States of America to Robert G. Richmond, a notary public in and for the county of —— and State of Missouri, Greeting:

You are hereby commissioned and authorized to take the depositions of Owen Ford upon the interrogatories hereto annexed in a certain cause now pending undetermined in the circuit court of the United States for the sixth judicial circuit and district of Kentucky, Owensboro division, wherein The Owensboro Water Works Company, of Owensboro, Kentucky, is complainant, and The City of Owensboro is defendant, on behalf of the complainant (as per written agreement of parties by attorneys as to the taking of proof filed in the above cause), and we do hereby require you before whom such depositions are to be taken, to reduce the same to writing, and to close it up under your hand and seal, and direct it to the clerk of the above entitled court, at Owensboro, Kentucky, as soon as may be after the execution of this commission; that you return the same when executed as above directed, with the title of the cause indorsed upon the envelope of the commission.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Owensboro, in said
186 district, this 26th day of November, A. D. 1900.

[SEAL.] (Signed) THOS. SPEED, *Clerk*,
By DUDLEY LINDSEY, *Deputy*.

Circuit Court of the United States, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS CO. OF OWENSBORO, Ky., Complainant, *vs.* CITY OF OWENSBORO, &c., Defendant. } Interrogatories.

Interrogatories to be propounded to Owen Ford, a witness for the complainant in the above entitled action, residing in the city of St. Louis, in the State of Missouri.

First interrogatory.

What is your name, occupation and place of residence?

Second interrogatory.

How long have you been engaged in said business, and what if any experience have you had either in planning, constructing or building water works, or similar plants in the United States or elsewhere?

Third interrogatory.

If in answer to the last interrogatory you shall say you have had such experience state for what length of time and during said time, how many plants have you either constructed, planned or built or assisted in the construction, planning or building, and at what place did you construct the same, what have been the cost of the plants, ranging from what sum to what sum?

Fourth interrogatory.

State whether or not you are familiar with the cost of the building and construction of such plants, and the material and labor used therein in the various cities in the United States?

Fifth interrogatory.

187 State whether or not you have ever examined the plant owned by the complainant in the city of Owensboro, Kentucky, and in operation there now, if yea, when, and what was its condition when you saw it?

Sixth interrogatory.

State fully what was its condition and what kind of a plant it was when you saw it, whether or not modern, well planned or constructed or the contrary thereof?

Seventh interrogatory.

State what was the fair cash value of said plant at the time you saw it, and what in your opinion did it cost to construct said plant, as it stood on the 19th day of March, 1900, what was its fair cash value at that time; in this connection, if you can, state separately the value of the pipe system, pumping station and the machinery therein?

Eighth interrogatory.

State whether or not in operating the plant like the water works in the city of Owensboro, there is a depreciation in the value of a plant by reason of its use?

Ninth interrogatory.

If you shall answer the last interrogatory in the affirmative state what per cent. per annum should be allowed for depreciation of plant when prudently managed on account *on* natural wear and tear?

Tenth interrogatory.

State whether or not you have examined the water ordinance passed by the city council, of Owensboro, on the 19th day of March, 1900, and if so, state whether or not the rates therein fixed are fair

and equitable or the reverse, and how do they compare with the rates charged in other cities of the size of the city of Owensboro, and whether or not you have ever had occasion or have examined into the question of rates as fixed by water companies in cities of the size of Owensboro, and where the plant is owned by a private corporation, and if so, state fully on this subject, and in this connection state whether or not the rates are reasonable or unreasonable, and give the facts on which you base your judgment?

Eleventh interrogatory.

State whether or not the proposed ordinance is reasonable
188 or unreasonable, with reference to the collection of the water rates, that is, as to the time when they should be collected, and what in your judgment, based on experience would be the effect thereof?

Twelfth interrogatory.

If you shall say in answer to the last interrogatory, a loss would result, state all the facts you base that statement?

Thirteenth interrogatory.

If you shall say in answer to a former interrogatory you have examined the plant, state if you can, what in your judgment it would cost to prudently and economically manage and operate said works per year?

Fourteenth interrogatory.

Do you know, or can you set forth any matter or thing which may be of benefit or advantage to the parties at issue, in this cause, or either of them, or that may be material to the subject of this your examination, or the matter in question in this cause, if yes, set forth the same fully and at large in your answer?

BINGHAM & DAVIS,
SWEENEY, ELLIS & SWEENEY,
Solicitors for Complainant.

Circuit Court of the United States for the Sixth Judicial Circuit and District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

The foregoing three pages are a true copy of the interrogatories to be propounded to Owen Ford, a witness for the complainant in a cause pending in the circuit court of the United States for the sixth circuit and district of Kentucky, at Owensboro, Kentucky, of the Owensboro Water Works Company *vs.* The City of Owensboro, and on file in said cause.

Witness my hand and seal of said court, this 26th day of November, 1900.

(Signed) THOS. SPEED, *Clerk*,
[SEAL.] By DUDLEY LINDSEY, *Deputy*.

The deposition of Owen Ford, taken on behalf of plaintiff, in an action now pending in the Owensboro circuit court of the
189 United States for the sixth circuit and district of Kentucky, wherein The Owensboro Water Works Co. is plaintiff and City of Owensboro is defendant.

The said OWEN FORD having first been duly sworn, deposes as follows:

In answer to the first interrogatory the witness says:

My name is Owen Ford, I am by occupation a consulting and supervising engineer, and reside in the city of St. Louis, Missouri.

In answer to the second interrogatory, witness says:

I have been engaged in the occupation of consulting and supervising engineer for the last sixteen years. I have been retained in various enterprises continuously during that time, and have had experience in planning, constructing and building water works and similar plants in the United States and Mexico.

During the last sixteen years I have constructed and assisted in the construction of a large number of plants of water works and similar plants in the United States and Mexico.

In answer to the third interrogatory, he says:

My experience in the planning, constructing and building of water works extend over the last sixteen years.

I have constructed or assisted in the construction of about (200) two hundred plants of all kinds. I do not care to give a complete list of the places where I have constructed water works and similar plants, but give the following as a partial list of the places at which plants were located: Malden, Mo., Dexter, Mo., Carthage, Mo., Ouray, Colo., Durange, Mexico, Hastings, Nebraska, Caffeyville, Ks., Ottumwa, Ia., Astoria, Ill., O'Fallon, Ill., McLeansboro, Ill., Franklin, Ind., Patesville, Ark., Marianna, Ark., Wymie, Ark., Paragould, Ark.

The cost of water works built under my construction or assistance have ranged from two thousand ($2000.00) to two hundred thousand dollars ($200,000.00).

In answer to the fourth interrogatory, witness says:

I am familiar with the cost of the building and construction of such plants, and the material and labor used therein in the various cities of the United States.

In answer to the fifth interrogatory, witness says:

I have personally examined the plant owned by plaintiff in the city of Owensboro, Ky., and in operation there now; I examined it about April 1st, 1900, somewhere between April 1st and April 3rd, 1900. The condition of the plant at that time was first class.

In answer to the sixth interrogatory, witness says:

The plant at Owensboro when I examined it in April was in good condition, well designed and constructed and modern arrangement.

190 In answer to the seventh interrogatory, witness says:

A fair cash value of the plant at Owensboro at the time I saw it was, in my opinion, $250,000.00. In my opinion it would cost to construct said plant from $245,000.00 to $250,000.00. The value of the pumping system was, in my opinion, about $130,000.00. The balance of the system, to wit: pumping station and machinery therein was worth $120,000.00.

In answer to the eighth interrogatory, witness says:

In operating a plant like the water works in Owensboro, there is a depreciation in its value by reason of its use.

In answer to the ninth interrogatory, witness says:

About three and one-half per cent. (3½ per cent.) per annum should be allowed for depreciation of a plant, if managed prudently, and depreciation resulting from natural wear and tear.

In answer to the tenth interrogatory, witness says:

I have examined the ordinance mentioned in the interrogatory. In my opinion the rates fixed in that ordinance are unfair and inequitable; they are much lower than the rates charged in other cities of similar size. I have had occasion to examine into the rates charged in various States for the special purpose of ascertaining such rates for use in my ordinary business; I have examined into the rates charged for both municipal plants and plants managed by a private corporation. The rates named in the ordinance referred to in the first part of the interrogatory are unreasonable. The facts on which I base my judgment are common commercial and practical facts and conditions attending the building or cost of maintenance and operation of plants of this nature.

In answer to the eleventh interrogatory, witness says:

The ordinance in question is unreasonable with reference to the collection of water rates as to the time when they should be collected. The conditions in the ordinance in relation to the collection of water rates, that is, as to the time and manner of collecting, are unreasonable. If such conditions should be enforced, the result would be a loss so great as to render the successful operation of the plant unpracticable. The universal custom in all water works plants with which I am familiar, is, if the water works company, whether a public or private corporation, to collect for the water to be supplied in advance, either quarterly, or at some other fixed and determined period. The universal experience of water works companies is, that a large number of the consumers of water are persons who are officially irresponsible. I
191 mean by that persons against whom a judgment at law could not be enforced, and where they are allowed to have water on credit, or where they are allowed to use water and pay for it after it has been used, the company has no adequate remedy to secure the collection of its revenues, in a large number, if not a majority, of the cases in which it supplies water to consumers. A great many

of the consumers use water in such small quantities, and the charge for the use of the water in each individual case is so small that the cost of enforcing collection for the use of water even in cases where the consumer is solvent is prohibitive, owing to the disparity between the amount to be collected and the expense attending the collection of it. For that reason a great loss would result in Owensboro if an attempt were made to collect water rentals in the manner prescribed in the ordinance. The company would be without remedy in a great many cases, and in a great many cases find it absolutely impossible to collect anything for the water it furnished. Hence, in all cities, water works companies require payment in advance in order to prevent loss arising this way.

There are other elements in the ordinance which would take away from the company rights necessary to properly protect and regulate its business which would inevitably result in loss to the company in the collection of its revenues.

In answer to the twelfth interrogatory, witness says:

The cost per annum to prudently and economically manage and operate the works at Owensboro would be about thirteen thousand dollars ($13000.00), not including the interest or money invested and taxes. In other words, the actual expenses of running the plant outside of interest on the bonds and taxes would be $13000.00 per year.

In answer to the thirteenth interrogatory, witness says:

The answers which I have given you have been based upon my knowledge of the plant as it existed when I saw it early in April of this year and from my knowledge of the usual way of conducting water works and collecting revenues of water works companies.

In answer to the fourteenth interrogatory, witness says:

I do not think of anything further to add at present.

(Signed) OWEN FORD.

192 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, R. G. Richmond, a notary public in and for the city of St. Louis and State aforesaid, do certify that the above and foregoing deposition of Owen Ford was taken before me at my office in the city of St. Louis, State of Missouri, on the seventh day of December, 1900, upon the interrogatories hereto annexed; that the said witness was first sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, before giving his testimony; that the testimony of said witness was written by me in his presence, read to and subscribed by him in my presence. I further certify that at the taking of said deposition neither party was present in person nor represented by agent or attorney.

(Signed) R. G. RICHMOND,
Notary Public.

[Seal of Notary.]

My commission expires June 21st, 1903.

On the back of said deposition is the following indorsement, to wit: Filed Dec. 11, 1900. Thomas Speed, clerk, by Dudley Lindsey, D. C.

And on another day, to wit: on the 17th day of December, 1900, there was filed in the clerk's office of the circuit court of the United States at Owensboro, Kentucky, the deposition of J. W. Holmes, taken on behalf of the complainant, which was of the following words and figures, to wit:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO, &c., Defendant.

Commission to Take Depositions.

The President of the United States of America to I. F. Perkins, of Bessemer, Ala., Greeting:

You are hereby authorized and commissioned to take the
193 deposition of J. W. Holmes upon the interrogatories and cross interrogatories hereto attached, a witness for the complainant in the above styled cause now pending in our said court and we do hereby require you before whom such testimony is to be taken, to reduce the same to writing, and to close it up under your hand and seal, and direct it to the clerk of the above entitled court, at Owensboro, in the district of Kentucky, as soon as may be after the execution of this commission; that you return the same when executed as above directed, with the title of the case endorsed upon the envelope of the commission.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Owensboro, in said district, this 4th day of December, A. D. 1900.

(Signed) THOS. SPEED, *Clerk*,
[SEAL.] By DUDLEY LINDSEY, *D. C.*

Circuit Court of the United States, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO, &c., Defendant.
} Interrogatories.

Interrogatories to be propounded to J. W. Holmes, witness for complainant in the above entitled action, residing at Bessemer, Alabama.

First interrogatory.

What is your name, age, occupation and place of residence?

Interrogatory No. 2.

State what experience, if any, you had in the construction and operation of water works, and for what length of time, and what familiarity have you with the costs and value of such plans?

Interrogatory No. 3.

State whether or not you are familiar with the system of the water works owned by the complainant in the city of Owensboro,
194 Kentucky, and if so, how long have you known it, and when did you first see it, and when did you examine it last, what was its condition then?

Interrogatory No. 4.

State your familiarity with said water works owned by the complainant at Owensboro, Kentucky, and when you first examined it, and if you shall say that you have examined it, state how you came to make such examination, and when?

Interrogatory No. 5.

If, in answer to the last question, you shall answer that you have examined them, state fully when this was, and what, if any, changes were suggested by you and whether or not the changes were carried out by the company, and if so, what were the changes, and what, if anything, was the effect of such change?

Interrogatory No. 6.

If, in answer to the previous interrogatories, you shall say you are familiar with the water works, its piping system, in Owensboro, Kentucky, will you please give as near as you can a description of the plant, and its piping system, giving in this connection a description of the building, pumping machinery, piping system, boilers, &c., and what was their condition when you saw it last?

Interrogatory No. 7.

State whether or not the plant as in operation in the city of Owensboro, when you saw it last, is modern and effective, and in this connection make a full and complete statement of its piping system, and its present condition?

Interrogatory No. 8.

State what is the capacity and power of the water works now in use and operation in the city of Owensboro and owned by the complainant to supply water to the inhabitants and citizens thereof?

Interrogatory No. 9.

State what, in your opinion, was the fair cash value of said plant on the 19th day of March, 1900, when you last saw it, and if you can do so, give the cost of the plant separating, in doing so, the buildings, pumping machinery and the pipe system?

195 Interrogatory No. 10.

State whether or not you have had any occasion to examine the intake pipes of said water works, relative to their location, and the possibility of the supply of water furnished by it, being contaminated or made impure by offal from the distilleries above it, or from the discharge from the sewer near or at the side of the works, and in this connection state your knowledge on the subject, and how you know it?

Interrogatory No. 11.

State the condition of the pumping machinery and whether it is a modern, up-to-date plant or not, or whether it is a patch-up job, and whether or not the system is so arranged as to make the pumps effective, or whether it is arranged so as to over-crowd the pumps or over-tax them, or to have excessive pressure in the pipes?

Interrogatory No. 12.

What connection, if any, have you had with the water works, other than at Owensboro; state fully on this subject?

Interrogatory No. 13.

State whether or not in operating the plant like the water works in the city of Owensboro, there is a depreciation in the value of a plant by reason of its use?

Interrogatory No. 14.

If you shall answer the last interrogatory in the affirmative, state what per cent. per annum shall be allowed for depreciation of plant, when prudently managed, on account of natural wear and tear?

Interrogatory No. 15.

State whether or not you are familiar with water rates usually charged by water companies to their patrons, of towns or cities of the population and size of Owensboro where the water works are owned by private individuals, and if so, state your knowledge on this subject; what, if any, investigation have you made, and then state whether or not you have examined the ordinance of the city council of the city of Owensboro of date March 19th, 1900, and, if so, state whether or not said ordinance is reasonable or unreasonable, stating fully your reasons therefor, and how do the rates pro-
196 posed by the said ordinance compare with rates charged by other water companies in cities of the same population as Owensboro.

Interrogatory No. 16.

State whether the ordinance referred to in the previous interrogatory is reasonable or unreasonable in the manner of collecting the water rates, pointing out in this connection wherein it is reasonable or unreasonable, and giving your reasons therefor?

Interrogatory No. 17.

State anything you may know of its requirements with reference to the meters; whether reasonable or unreasonable, and what, if anything, would be the additional cost to the complainant to comply with the requirements with reference to the meters?

Interrogatory No. 18.

State whether or not you are familiar with the operating expenses of the Owensboro Water Works Company in the past, and whether or not it has been prudently and economically managed, and what in your judgment is the cost per month to prudently manage and operate said plant?

Interrogatory No. 19.

Do you know or can you set forth any matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, of the matter in question in this cause, if yea, set forth the same fully and at large in your answer?

BINGHAM & DAVIS,
SWEENEY, ELLIS & SWEENEY,
Solicitors for Complainant.

A true copy attest.

Witness my hand and seal of said court this 4th day of December, 1900.

[SEAL.] THOS. SPEED, *Clerk*,
By DUDLEY LINDSEY, *D. C.*

22—58

Cross-interrogatories to be propounded to W. J. Holmes, a witness for the complainant, in a cause pending in the circuit court of the United States for the sixth circuit and district of Kentucky, of The Owensboro Water Works Company *vs.* The City of Owensboro.

197 Cross-interrogatory No. 1.

State whether or not you have any interest as stockholder, officer or employé of the Owensboro Water Works Company; and if you answer that you have any interest, or that you are a stockholder, state what your interest is and what amount of stock you now hold, and give the names and residence of each stockholder in said company and the amount of stock held or owned by each stockholder to the extent of your knowledge on this subject.

Cross-interrogatory No. 2.

State whether or not you were employed at any time —, or a stockholder in the Owensboro Water Company, the predecessor of the complainant, and if so, state how long you were in the employ of the Owensboro Water Company, and the amount of stock, if any, you held herein.

Cross-interrogatory No. 3.

State, if you know, the date at which the Owensboro Water Company, its machinery and piping system were first constructed in and at the city of Owensboro; and state, if you know, the original and actual cost of the piping system then laid and the machinery then put in for pumping water into the piping system, and in making this statement give the quantity in feet of pipe laid down and the sizes of the pipe, and describe the engines and the pipe apparatus as fully as you can and state the actual cost thereof as fully as you can do.

Cross-interrogatory No. 4.

State the total number of feet of pipe laid in the ground and used for the distribution of water to the city of Owensboro, and to the inhabitants of the city of Owensboro, and give the number of feet of four inch pipe, six inch pipe, eight inch pipe, ten inch pipe and twelve inch pipe, and the cost of this pipe per ton. Then state the quantity of sixteen inch pipe and twenty inch pipe, and where this pipe is located, whether it is used for suction pipe and the costs of that pipe per foot. State the number and size of the valve- in the Owensboro Water Works Company's system and the costs thereof; state the number and size of the fire hydrants in the system and the costs thereof; state the number and size and costs of the valve boxes; state the number of water meters, and the number of water taps and the costs thereof to the company; state the number and size of pumping engines at the pumping station and the costs thereof, the number and size of the boilers and the costs thereof.

198 Cross-interrogatory No. 5.

State whether the books and records of the Owensboro Water Company are now in existence, and if so, in whose possession they are, and where they are. If any of the books are not in existence, state when they ceased to exist and what brought about their destruction, if they are destroyed. If they are not destroyed, state when you last had knowledge of their existence. State whether or not accounts were kept, or have been kept, of the costs of the work done, and expenditures for materials, extension, repairs and improvements; if such accounts have been kept, state by whom they were kept and where those accounts and books are at this time and who has custody of them?

Cross-interrogatory No. 6.

State what amount of money you have received as a stockholder, or otherwise, from the Owensboro Water Company during its existence, and from the Owensboro Water Works Company from the time of the organization of the company down to this time. State what amount of stock you have received of the Owensboro Water Works Company, the complainant herein, and what amount of bonds you have received from said company, or bonds of said company, and what, if anything, was paid to Owensboro Water Company for any bonds or stocks received by you; if so, what amount was paid, and how was it paid. State fully and completely all the facts relating to the organization of the complainant, Owensboro Water Works Company and by whom that organization was effect*ive*, that is, the names of all persons concerned in it, either as stockholders or bondholders in the Owensboro Water Company, and as stockholders or owners of bonds in the Owensboro Water Works Company.

Cross-interrogatory No. 7.

State the largest outstanding bonded indebtedness of the Owensboro Water Company at any one time; and state the largest outstanding bonded indebtedness of the Owensboro Water Company since the organization of the Owensboro Water Works Company, and state what amount of the — Owensboro Water Company is now unpaid.

Cross-interrogatory No. 7.

State what amounts *was* realized for the bonds issued by the Owensboro Water Works Company, and what was done with
199 the money. Give the names, residences and addresses of the brokers or persons who negotiated the sale of these bonds, if any broker or person did so within your knowledge.

Cross-interrogatory No. 8.

Is there now in your possession, or under your control, any of the records or papers belonging to the Owensboro Water Company or

the Owensboro Water Works Company, if so, state what books, records and papers there are and where are they stored.

——— ———,
Attorney for City of Owensboro.

A true copy attest. Witness my hand and seal of said court this 4th day of December, A. D. 1900.

(Signed) THOS. SPEED, *Clerk*,
[SEAL.] By DUDLEY LINDSEY, *D. C.*

Circuit Court of the United States, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
CITY OF OWENSBORO, ETC., Defendant.

By virtue of the commission hereunto annexed, issued from the office of the clerk of the circuit court of the United States, district of Kentucky, Owensboro division, I, I. F. Perkins, the commissioner therein named, have called and caused to come before me the said J. W. Holmes, the witness named in said commission, on the 15th day of December, 1900, and having duly cautioned and sworn the said witness to speak the truth, the whole truth and nothing but the truth, J. W. Holmes, the said witness, deposes and saith as follows:

To the first interrogatory he saith:

My name is J. W. Holmes; occupation, manager of the United States Cast Iron Pipe and Foundry Company's plant at Bessemer, Alabama; residence, Bessemer, Alabama.

200 To the second interrogatory he saith:

I engaged in the construction of water works in 1884 and was wholly engaged in the construction and operation of water works from that time until 1892; since which time I have been engaged in the manufacture of pipe and machinery for water works construction and only connected with the water works business in an advisory capacity with the exception of last year which was nearly devoted to the extension and improvement of water works at Paducah, Kentucky. I consider my connection with the manufacturers of water works piping machinery, together with my experience in the construction and operation of water works for so many years, would justify me in assuming to know the costs and value of such plants.

To the third interrogatory he saith:

I have been familiar with the system of water works at Owensboro, Kentucky, for the last eleven years, having examined it first in 1889. I examined these works last in April of this year at which time it was in first class condition and fully up to the standard of requirements of such systems.

To the fourth interrogatory he saith:

The first paragraph of this question is answered in the preceding answer. I went to Owensboro for the specific purpose of examining these works under the employ of Samuel A. Miller who was at that time president of the company.

To the fifth interrogatory he saith:

I have visited the Owensboro water works for the first time in 1889 for the purpose of determining the condition of the works, and, after a thorough investigation, recommended to the directory of said company certain changes and improvements in their piping system, such as the removing of the small pipes and replacing with larger capacity and extending the connections through certain streets, also the building complete of two pumping engines of modern type to replace the old ones, which were, in my opinion, not sufficiently reliable or economical in their operation to meet the future requirements of the city of Owensboro. My recommendations were approved and adopted, and I was subsequently employed to superintend the construction and installation of such improvements as I had recommended, which, owing to the nature of the work
201 and the disadvantages under which it had to be done (while maintaining the necessary service required under their contract with the city), required a period of nearly two years; at the expiration of which time the works were complete and as perfect in every detail as any water works system of like magnitude in the country.

To the sixth interrogatory he saith:

The pumping plant of the Owensboro Water Works Company is located on the bank of the Ohio river within the corporate limits of the city of Owensboro. It consists of a brick building with slate roof, of ample size to accommodate the pumping engines, boilers and appurtenances necessary for the installation and operation of such a plant, together with the necessary repair shop, room and store house, and one compound condensing pumping engine of a capacity of 2,000,000 (two million) gallons per day, which is located in a steel well about twelve feet in diameter by thirty-eight ft. in depth, together with its suction pipe extended the proper distance into the Ohio river and its force mains, valves and connections to the street or distribution system; and one compound condensing pumping engine of a capacity of 4,000,000 (four million) gallons per day, erected in a steel well about fifteen feet in diameter by forty feet in depth, together with its connection pipe extending a proper distance into the Ohio river and its force pipes, valves and connections extended to the street or distribution system; and three horizontal return tubular boilers together — the necessary feed pumps and feed pipes, feeder and other necessary appurtenances pertaining thereto; and one brick chimney of about 65 feet in height and of sufficient capacity for two pumping plants; and one electric generator, together with its lamps and wiring for lighting the buildings and well. When last examined by me the machinery,

boilers, building and chimney and other appurtenances were in first class condition.

To the seventh interrogatory he saith:

The property of the Owensboro Water Works Co., when last examined, were quite effective and in as perfect a condition as any water works plant in the country. The distribution pipe system of the Owensboro Water Works Co. consists of about twenty-one miles of pipe, ranging from four to twenty inches in size, and is made up of what is known as standard water weights, and is to-day in a perfect state of preservation.

202 To the eight- interrogatory he saith:

The combined power of the pumping plant at Owensboro is sufficient to deliver 5,000,000 (five million) gallons per day against a head or pressure equal to a column two hundred (200) feet in height, which is far in excess both in pressure and volume of that required to comply with the water works ordinance of the city of Owensboro.

To the ninth interrogatory he saith:

I estimate the value of the pumping station at $140,000.00 (one hundred and forty thousand dollars). This includes building, chimney, boilers, pumps and engines, the steel caissons in which machinery is located and the costs of tunnels through which the intake pipes are placed, extending from the caissons in the pumping station to the river front. I estimate the value of the distribution system at $140,000.00 (one hundred and forty thousand dollars), and in this I include all the main pipes and special castings at the street crossings, the fire hydrants and connections, the valves and stop boxes, the meters, together with their wells and connections and all of the taps and service boxes for domestic consumers. This estimate is based on the market value of these fixtures plus the cost of labor necessary for assembling them.

To the tenth interrogatory he saith:

I have made a careful examination of the intake pipe referred to as they have been broken and necessitated repairs which were made under my supervision. To have an absolute knowledge of the work necessitated my making a personal examination of the river bed, which I did by the use of the submarine armor, and this examination was made while the river was at a low stage, and I found that there is quite a current keeping the bed of the river swept clean at this point and inasmuch as the sewer referred to is located below the water works property, it would be impossible for anything discharged from it to be taken into the intake pipes of the water works. With regard to the offal from the distilleries it is my opinion that inasmuch as this is discharged on the river bank or immediately at the shore, that it is swept past the pumping station by the swift current before it could possibly extend to such a great distance as to reach the outer end of the intake pipes which is submerged to a depth of sixteen feet when the river is at a low stage.

203 To the eleventh interrogatory he saith:

The pumping machinery that is now in use at Owensboro

was designed and constructed with special reference to the service required of it which is known as the direct system which is certainly the most effective system of combining domestic and fire service, and the evidence of this being adapted for this service is in the fact that it has been performing same for a period of about eight years without interruption, and if I were building a water works of this class to-day, the only reason I could have for building a different engine from these would be to lessen the first cost of construction, as these engines have certainly been as effective and economical as any I have ever known in actual service, and will be in service many years more than they have already been. With reference to the excessive pressure, this is a matter that is at all times under the control of the operating engineer and is governed according to the requirements for fire service or otherwise.

To the 12th interrogatory he saith:

From 1884 to 1898 I was connected with the building and operation of the water works at Paducah, Kentucky; Owensboro, Kentucky; Frankfort, Kentucky; Danville, Illinois; Defiance, Ohio; Decatur, Alabama; during which time these various works have been remodeled or extended by the addition of water mains, fire hydrants and pumping machinery, which improvements have been made under my supervision.

To the 13th interrogatory he saith:

Yes, there is a certain depreciation in the use of all machinery. What this amounts to in a plant of this character I am not able to state definitely, and would say there is a great difference of opinion on this question, and at present I have not sufficient data at hand, nor have I the time to secure same, to enable me to give an opinion as to what the depreciation would amount to.

To the 14th interrogatory he saith:

I am not prepared to answer this with any degree of accuracy.

To the 15th interrogatory he saith:

I am familiar with the rates usually charged by water companies in cities of the class to which Owensboro belongs, having
204 made a careful investigation of same at the time the question of rates was first raised in the city of Owensboro. I would say that the revised rates put in effect on April 1st, 1896, by the Owensboro Water Works Company were arrived at by taking the average charged by one hundred cities throughout the United States. I would, therefore, state that these charges are reasonable and compare with the charges of other cities of this class. I have examined the ordinance passed March 19th by the common council of the city of Owensboro, and in view of the foregoing, I consider the rates therein adopted are both unreasonable and unjust, and, if enforced, would be equal to confiscating the property of the Owensboro Water Works Company.

To the sixteenth interrogatory he saith:

The ordinance just referred to is unreasonable and unjust inasmuch as it provides that no moneys shall be collected for water service in advance, and experience has long since shown that a large

proportion of water rents would be lost if not collected in advance. It is my opinion that it would be impossible to make collections after the service has been rendered.

To the seventeenth interrogatory he saith:

The ordinance above referred to requires that a meter be placed for any purpose upon application of any consumer or any proposed consumer and for a consideration which would not more than compensate for the maintenance and inspection of the meter, and there are no provisions made for compelling such applicant to use a certain specific amount of water or to rent such a meter for any specific length of time; hence, anyone could require a meter to be placed for their specific use or information and could at any time cease or decline to pay the water rent or have the use thereof discontinued without incurring liability on their part for the costs of such meter or the installation thereof, and it is my opinion, based on former experience and observation, that many persons would discontinue the use after having made one or two payments, while some would never make the first payment. I, therefore, conclude that there is absolutely no equity in this clause of the ordinance.

To the eighteenth interrogatory he saith:

I was familiar with the operation and management of the Owensboro water works from 1889 until the year 1898, since which
205 time I have not examined the books of this company. During that period I do know that these works were operated as economically as was practicable to do without impairing the efficiency of the service rendered to its patrons. The total expense of operating these works, including taxes and interest on bonds, was about $26,000.00 (twenty-six thousand dollars) per year. Since that time the works have had more or less litigation pending and they doubtless have incurred other expenses, the amount of which I am not definitely informed.

To the ninth interrogatory he saith:

The location of the pumping station of the Owensboro Water Works Co. was defined by ordinance passed by the common council of the city of Owensboro which developed to be a bed of quick sand extending clear to the river front or water level. This necessitated the sinking of very expensive foundations for the water works building and chimney, and necessitated the sinking of steel caissons wherein to erect the pumps and other appurtenances thereto and over which the pumping engine is placed. It also necessitated the building of heavy cast iron frame work or columns extending from the bottom of these caissons to the top thereof to form a foundation for the pumping engines, thus adding a seemingly unnecessary expense to the costs of constructing the pumping engines. This strata of quick sand is near the pump level or about parallel with the intake pipes leading from the river to the pumps. This also added largely to the cost of tunneling from the caissons to the river for laying these pipes. Some years after the works had been put in operation, the action of the river current undermined the river front property which caused it to cave off or fall into the river at certain

stages and to the maintenance of this property it became necessary to protect same by driving piles along the river front and filling back of same with stones and other material. The cost of this work, according to my recollection, was about $13,000.00 (thirteen thousand dollars).

Furthermore in the original water works ordinance which was passed by the common council of the city of Owensboro, section 9 reads as follows: "The said company shall have the power and authority to make and enforce as part of the conditions upon which it will supply water to consumers all needful rules and regulations not inconsistent with the law or provisions of this ordinance." Section 10 reads as follows: "The said city will adopt and
206 enforce ordinances protecting said company in the safe and unmolested exercise of these franchises and against fraud and imposition, etc." It is obvious that at the time this franchise was granted to the Owensboro Water Company there was no thought on the part of either of the parties of the city making or enforcing either rates or rules which would abridge the rights of the company, but, on the contrary, was adopted with the view of encouraging the expenditure of the necessary money to install an adequate water system.

Furthermore, in order to protect the city's interest, the common council in contracting with the water company reserved the right to acquire the ownership of their properties at any time they might deem it necessary to do so, and, to that end, prescribed certain fixed rules by which they might avail themselves of these rights and privileges. Therefore the ordinance passed in March, 1900, is not only unfair and unjust, but is not in accordance with any thought suggested in the original ordinance or in the contract with the water company and under which the water works company is now governed.

To the 1st cross-interrogatory he saith:

I am a stockholder in the Owensboro Water Works Co. My interest consists of 590 shares of stock. I am acquainted with several stockholders of the Owensboro Water Works Company, to wit: Mrs. Henrietta Miller, Dennis Miller, Robert W. Bingham, all of the city of Louisville; A. F. Callahan, of Chicago; H. P. Martin and Phil T. Watkins, of Owensboro, Kentucky. I could not state exactly the amount held or owned by each party.

To the 2nd cross-interrogatory he saith:

I never owned any stock of the Owensboro Water Company, nor was I at any time employed by said company or officer thereof.

To the 3rd cross-interrogatory he saith:

I have no absolute knowledge of the original plant of the Owensboro Water Company, as some of the original machinery and piping had been broken up and a great many changes had been made in the original plant before I had occasion to inspect it, and while I have examined the map of the old pipe system, it has been several years since and I am not in position now to state the size or quantity of pipe or describe the engines. Anything I should state on

this question would be hearsay except that by cutting into the old pipe we find that it is what is known as standard weight water pipe.

207 To the 4th cross-interrogatory he saith:

The total length of mains, all sizes, is approximately twenty-one miles. Inasmuch as I have no map or other data at hand showing the exact number of feet of each size, I am not in position at this time to state the exact quantity of each size of pipe or the exact number of valves, special castings, valve boxes, fire hydrants, etc. Neither do I know the exact number of taps or meters, and as these were purchased at various times with a fluctuating market, I am not in position to state the cost thereof to the company. There are two compound condensing pumping engines and three horizontal return tubular boilers, one hundred horse power each. I am not in position at this time to state the exact cost of this machinery to the company, but it could be duplicated at present for about $50,000.00 (fifty thousand dollars).

To the 5th cross-interrogatory he saith:

I have no knowledge of the books of the Owensboro Water Company and could not say whether they are in existence or not, nor anything of their methods of keeping accounts of repairing or improvements or other expenditures.

To the 6th cross-interrogatory he saith:

I never rendered any service to the Owensboro Water Co. and never received any moneys from them. My first connection with the Owensboro Water Works Co. was employment as an expert engineer in 1889. I visited the works for the purpose of inspecting same and made certain recommendations regarding requirements to modernize the plant. During the time these improvements were in progress, I visited Owensboro several times. For such services I was paid from time to time sums varying in proportion to the time required, I can not state definite amount at this time. In 1890 I took regular employment with them as chief engineer of their works. This employment was contracted for a period of five years for which I received a fixed salary of $500.00 (five hundred dollars) per annum. This salary was paid me by the Owensboro Water Works Co. in accordance with the contract, since which time I have never received any salary or fee for services rendered and am sorry to say I have never received any dividend or other moneys from said company except sufficient amount to reimburse me for traveling or other expense incurred in their interest, nor have I received any stocks or bonds of said company, and have no knowl-

208 edge of any payments having been made to the Owensboro Water Company for bonds or stocks received by any of the present stockholders of the Owensboro Water Works Company, and know nothing of the organization or the parties organizing the Owensboro Water Company other than hearsay, and very little regarding the organization of the Owensboro Water Works Company, I having purchased my stock from Samuel A. Miller, who, I under-

stand, was one of the original promoters in the Owensboro Water Works Company, but did not know him as a bondholder.

According to my recollection the American Loan & Trust Co. in Boston were appointed trustees of the bonds of the Owensboro Water Works Company, and when bonds were issued or sold, these trustees were consulted and had to assent to or approve the sale of such bonds and dictated the disposition of proceeds of such sale.

To the seventh cross-interrogatory he saith:

According to my understanding all the bonds of the Owensboro Water Company were called in and cancelled at the time of the organization of the Owensboro Water Works Company except five. These five bonds could not be secured at that time, but were guaranteed by the American Loan & Trust Company, the trustees of the bonds of the Owensboro Water Works Company, and according to my recollection the five bonds above referred to of the Owensboro Water Company are still outstanding and unpaid. I can not at this time recall the names of the owners, but according to my recollection they were held by some resident of Cincinnati, Ohio.

To the 7th cross-interrogatory he saith:

At the time I associated myself with the management of the Owensboro Water Works Company there was $200,000.00 (two hundred thousand) of the Owensboro Water Works Company's bonds outstanding. I am not informed as to who purchased these bonds or what broker, if any, handled them. During the several years that I was associated with the management of the Owensboro Water Works Company, they issued $38,000.00 (thirty-eight thousand —) of bonds, and I believe the most of them were sold through a firm of brokers in Boston, under the name of Woodbury & Moulton. These bonds were issued from time to time in order to secure funds to cover the costs of improvements and extensions in the works, and while I do not remember the exact rate at which the bonds sold at various times, I do remember that some of them sold as
209 high as 97½ per cent., and the proceeds of these bonds were used as above indicated.

To the eighth cross-interrogatory he saith:

I have never had any of the papers or records of the Owensboro Water Company in my possession. I am not an officer of the Owensboro Water Works Company, and have no books, papers or records pertaining to that company, but suppose all of the records of that company are in the hands of the treasurer in their Louisville office.

(Signed) J. W. HOLMES. [L. S.]

I, L. F. Perkins, the commissioner in said commission named, do hereby certify that the foregoing testimony and answers taken down and written by me in the words of the witness, J. W. Holmes, were read over to him; that he assented, swore to and subscribed the same in my presence at the time and place herein mentioned; that I have personal knowledge of the personal identity of the said

witness; that I am not of counsel or kin to either of the said parties to said cause nor interested in the event thereof.

And I enclose the said testimony, together with the said commission, and the interrogatories, direct and cross, to the said clerk of the circuit court of the United States, district of Kentucky, Owensboro division, whence the same emanated, as my full execution of said commission.

Given under my hand and seal this fifteenth day of December, 1900.

[NOTARY'S SEAL.] (Signed) I. F. PERKINS.

On the back of said interrogatories and deposition is the following indorsement, to wit: Filed Dec. 17, 1900. Thomas Speed, clerk, by Dudley Lindsey, D. C.

And on another day, to wit: on the 19th day of December, 1900, there was filed in the clerk's office of the circuit court of the United States, at Owensboro, Kentucky, the deposition of Frank Scheford, taken on behalf of the complainant; which was of the following words and figures, to wit:

210 Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO, &c., Defendants.

Commission to Take Depositions.

The President of the United States of America to John W. Gaither, Greeting:

You are hereby authorized and commissioned to take the deposition of Frank Scheford, of New Albany, Ind., upon the interrogatories and cross-interrogatories hereto attached, a witness for the complainant in the above styled cause now pending in our said court, and we do hereby require you, before whom such testimony is to be taken, to reduce the same to writing, and to close it up under your hand and seal, and direct it to the clerk of the above entitled court, at Owensboro, in the district of Kentucky, as soon as may be after the execution of this commission; that you return the same when executed as above directed, with the title of the case indorsed upon the envelope of the commission.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Owensboro, in said district, this 4th day of December, A. D. 1900.

(Signed) THOMAS SPEED, *Clerk*.
[SEAL.] By DUDLEY LINDSEY, *D. C.*

Circuit Court of the United States, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
CITY OF OWENSBORO, ETC.
} Interrogatories.

Interrogatories to be propounded to Frank Schefold, a witness for the complainant in the above styled action, residing in the city of New Albany, State of Indiana.

211 First interrogatory.

What is your name, occupation and place of residence?

Second interrogatory.

How long have you been engaged in such business and what, if any, experience have you had either in planning, constructing or building water works or similar plants in the United States and elsewhere?

Third interrogatory.

If, in answer to the last interrogatory, you shall say you have had such experience, state for what length of time and during said time, how many plants you have constructed, planned or built, or assisted in the construction, planning or building, and in what places did you construct the same, and what was the costs of the plants ranging from what sum to what sum?

Fourth interrogatory.

State whether or not you are familiar with the costs of the building and construction of such plants, and the material and labor used therein, in the various cities in the United States?

Fifth interrogatory.

State whether or not you have examined the plant owned by complainant in the city of Owensboro, Ky., and in operation there now? If yea, when, and what was its condition when you saw it?

Sixth interrogatory.

State fully what was its condition and what kind of a plant it was when you saw it; whether or not modern, well planned and constructed, or the contrary thereof?

Seventh interrogatory.

State what was the fair cash value of said plant at the time you saw it, and what, in your opinion, did it cost to construct it as it

stood on the 19th day of March, 1900? Then state what was the fair cash value of said plant at that time; and in this connection, if you can, state separately the value of the pipe system, the pump station and the machinery therein?

Eighth interrogatory.

212 State whether or not in operating a plant like the water works in the city of Owensboro, there is any depreciation in value of the plant by reason of its use?

Ninth interrogatory.

If you shall answer the last interrogatory in the affirmative state what per cent. per annum should be allowed for depreciation of the plant when prudently managed on account of natural wear and tear?

Tenth interrogatory.

State whether or not you examined the water ordinance passed by the city council of Owensboro on the 19th of March, 1900, and if so, state whether or not the rates therein fixed are fair and equitable or the reverse, and how they compare with the rates charged in other cities of the size of the city of Owensboro, and whether or not you have ever had occasion to examine into the question of rates as fixed by water companies in cities of the size of Owensboro, and where the plant is owned by a private corporation, and if so, state fully on this subject? And in this connection state whether the rates are reasonable or unreasonable? Give the facts on which you base your judgment.

Eleventh interrogatory.

State whether or not the proposed ordinance is reasonable or unreasonable in reference to mode and method and manner of collecting water rates, and especially as to the time when they should be paid or collected, and what in your judgment, based on experience, would be the effect thereof?

Twelfth interrogatory.

If you shall say in answer to the last interrogatory a loss would result, state all the facts upon which you base that statement?

Thirteenth interrogatory.

If you shall say, in answer to a former interrogatory, you have examined the plant, state if you can, what, in your judgment, it would cost to operate it under economical management, giving it by the year or month?

Fourteenth interrogatory.

State how many kind- of cast iron water pipe there are; I
213 mean with reference to grade and weight, and, if you can, state what is the grade of water pipe used in the city of Owensboro?

Fifteenth interrogatory.

Take a pipe four inches in diameter and twelve feet long and weighing twenty pounds per lineal foot, state what kind of pipe that is, whether light or standard, or not? And then state what, in your judgment, based on experience, it would cost per foot to lay such pipe?

Sixteenth interrogatory.

Do you know or can you set forth any matter or thing which may be of benefit or aid to the parties at issue in this case, or either of them, or that may be material to the subject of this your examination, or the matter in question in this cause? If yea, set forth the same fully and at large in your answer.

(Signed) BINGHAM & DAVIESS,
SWEENEY, ELLIS & SWEENEY,
Solicitors for Complainant.

A true copy attest. Witness my hand and seal of said court this 4th day of December, A. D. 1900.

(Signed) THOS. SPEED, *Clerk*,
[SEAL.] By DUDLEY LINDSEY, *Deputy*.

Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY
vs.
THE CITY OF OWENSBORO, &c.

Answers to Inter-ogatories by Mr. Frank Schefold.

Answers to interrogatories propounded to Mr. Frank Schefold, witness for the complainant in the above entitled action, residing at New Albany, Indiana, taken by John W. Gaither, of New Albany, Floyd county, State of Indiana, aforesaid, notary public.

The said FRANK SCHEFOLD, being first duly sworn, on oath deposes and says:

214 In answer to first interrogatory:

Frank Schefold; water works engineer; New Albany, Indiana.

Answer to the second interrogatory:

Have been engaged in the construction and operation of waterworks plants for over twenty years last past; have been consulted in the building of a large number of waterworks plants; have personally constructed and operated a large number of plants in the States of Illinois, Kentucky, Indiana, Tennessee, West Virginia and Ohio; I built and operated the New Albany, Indiana, waterworks plant, costing over $400,000.00, and had charge of operating the same for over ten years; was assistant engineer of the Cincinnati, Ohio, waterworks plant for over five years; was engineer in constructing and operating the plant at Parkersburg, W. Va., costing $300,000.00; was engineer in constructing and operating the plant at Mavsville, Kentucky, costing about $300,000.00; was also engineer in the construction of the plant at Danville, Illinois; also built waterworks plants at Paris, Tennessee; Malin, Tennessee; Huntingdon, Tennessee; Humbold, Tennessee; Springfield, Kentucky; Booneville, Indiana; and Bloomington, Indiana, and others.

Answer to third interrogatory:

In addition to what I have stated in answer to interrogatory number two will say the plants above named cost ranging from the sum of $16,000.00 to the sum of $500,000.00 and over; the cheapest of said plants being the ones constructed at Malin, Humbold and Huntingdon, Tennessee, they averaging in cost about $16,000.00; the most valuable of said plants being the one at Cincinnati, Ohio, it costing over $500,000.00, at which plant I acted as assistant engineer in the construction and operation of the same for a period of over five years.

Answer to interrogatory number four:

I am familiar with the cost of constructing and operating such plants in the United States.

Answer to fifth interrogatory:

I made a thorough examination of the plant at Owensboro, Kentucky, last March, and found it to be in very good condition.

215 Answer to sixth interrogatory:

I consider said plant at Owensboro superior to any plant I ever saw for the size of the city; the machinery was above the average of the kind used in such cities, and was of a very modern plan and well constructed.

Answer to seventh interrogatory:

As the plant stood at the time I inspected it last March its fair cash value was as near as I could estimate about $250,000.00, and the cost of construction was about the same; the value of the pipe system was about $125,000.00; the value of the pumping station and machinery therein was about $125,000.00.

Answer to eighth interrogatory:

The plant certainly depreciates in value by reason of its use, and such depreciation should be met by necessary repairs from time to time.

Answer to ninth interrogatory:

I would consider about five per cent.

Answer to tenth interrogatory:

I have examined said water ordinance and found the rates therein to be entirely too low to permit the operation of such plant, they are lower than any rates in my experience of plants, which pay their own running expenses; I have examined a great many rates of cities of similar size, operated by private corporations, and the rates fixed by the ordinance in this connection are unreasonably low; some of the rates of said ordinance are so low they would not pay necessary expenses of service pipes and maintenance of same and collection of rents therefor; I have examined the rates of a great many other towns of the size of Owensboro, and have operated plants of similar towns, and am free to say the rates by said ordinance are far lower than any other rates charged by plants in such towns, and there is no reason in my opinion why the plant at Owensboro could furnish water any cheaper than other plants in similar towns.

Answer to eleventh interrogatory:

The ordinance is inequitable and unreasonable in its terms, mode and manner of collecting rents, as it provides that rents from
216 private consumers may be collected monthly, quarterly or semi-annually, and this relates to only such consumers as use water meters, and certain consumers can not be required to use the meters against their objections, consumers can not be forced to use the meter except, after a reference to the mayor, whose decision is final; again parties not voluntarily using the meter, or forced to do so by the mayor, are not required to pay their rents until the end of the year, and in fact possibly not then.

Answer to twelfth interrogatory:

The ordinance is unreasonable and unjust because the consumers would have every possible chance to avoid the payment of rents after service pipes have been placed and water furnished, and in this way the company would be at a great loss.

Answer to thirteenth interrogatory:

On economical management it would cost about $25,000.00 per annum to operate the plant.

Answer to fourteenth interrogatory:

There are about twenty-one miles of mains and they range in size from twenty inches to four inches and they are buried in the ground at a depth of four feet; the grade of pipe used by the plant at Owensboro is of standard grade.

Answer to fifteenth interrogatory:

Such a pipe is very near or practically of a standard grade as considered by pipe manufacturers; to lay such pipe would cost from twelve to fifteen cents per foot.

Answer to sixteenth interrogatory:

I have stated about all I know in this matter.

(Signed) FRANK SCHEFOLD.

Subscribed and sworn to before me at New Albany, Indiana, this 15th day of December, A. D. 1900.

[SEAL.] (Signed) JOHN W. GAITHER,
Notary Public.

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217 Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO, &c., Defendants.

To all whom these presents shall come:

I, John W. Gaither, a notary public within and for the county of Floyd and State of Indiana, do hereby certify that pursuant to the annexed commission, dated December 4th, A. D. 1900, Mr. Frank Schefold, the witness named in said commission, who being of sound mind and lawful age, personally appeared before me on the 15th day of December, A. D. 1900, at my office in the city of New Albany, Floyd county, State of Indiana, when I took and completed his answers or deposition to the interrogatories propounded by the said attorneys for the complainant in the above entitled action, the said answers or deposition being hereto annexed and made part hereof, and I further certify that previous to such answers or deposition being taken I duly examined and cautioned the said Frank Schefold, and administered to him the following oath: "You do solemnly swear that you will true answers make to all such questions as shall be asked you upon these interrogatories without favor or affection to either party and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God."

I further certify that I have no interest whatever in the above entitled cause of action.

In witness whereof, I, the said notary public have hereunto subscribed my name, and affixed my official seal at New Albany, Indiana, this 15th day of December, A. D. 1900. My commission expires March 23, 1901.

[SEAL.] JOHN W. GAITHER,
Notary Public.

On the back of said deposition is the following indorsement, to wit: Filed Dec. 19, 1900. Thomas Speed, clerk. By Dudley Lindsey, D. C.

218 And on another day, to wit, on the 28th day of December, 1900, there was filed in the clerk's office of said circuit court of the United States at Owensboro, Kentucky, the depositions of Charles F. Sturtevant, James P. Wigal, Robert A. Cummins, C. W. Bransford, Charles Broeker, Charles Haney, E. B. Shifly and F. A. Ames, on behalf of the defendant, which were of the following words and figures, to wit:

In the United States Circuit Court, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
CITY OF OWENSBORO ET AL., Defendants. } Notice.

The complainant, The Owensboro Water Works Company, is hereby notified that the defendant, The City of Owensboro, will on Monday, the 10th day of December, 1900, between 10 o'clock a. m. and 3 o'clock p. m., proceed to take the depositions of divers persons to be read as evidence on behalf of the defendant on the trial of the above entitled cause. Said depositions will be taken at the office of the clerk of the U. S. court, or some adjoining room, in the U. S. court building at Owensboro, and said taking shall be continued from day to day until finished. This notice is given pursuant to the stipulation herein. This December 4, 1900.

GEO. W. JOLLY,
City Attorney, Owensboro, Ky.

To Sweeney & Ellis, Owensboro, Ky.

Endorsed: "Executed on the Owensboro Water Works Company by delivering to J. J. Sweeney, of the firm of Ellis & Sweeney, a true copy of the within Dec. 4, 1900; also executed on the Owensboro Water Works Company by delivering to J. Tandy Ellis, vice president of said company, a true copy of the within, Dec. 6, 1900. L. V. Pierce, C. P. O.

219 In the United States Circuit Court, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OWENSBORO ET AL., Defendants.

Agreement.

It is agreed by the parties to this action that publication of the depositions heretofore received by the clerk of this court may be immediately made, and it is further agreed that publications of such depositions as the clerk may hereafter receive in this cause may be immediately made upon receipt of same.

(Signed) OWENSBORO WATER WORKS COMPANY
OF OWENSBORO, KY.,
By SWEENEY, ELLIS & SWEENEY, *Att'ys, and*
THE CITY OF OWENSBORO.
By GEO. W. JOLLY, *City Attorney.*

United States Circuit Court for the Sixth Circuit and District of Kentucky, Owensboro Division.

THE OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF OWENSBORO ET AL., Defendants.

Depositions for Defendant-.

The deposition of Charles F. Sturtevant, taken on this the 10th day of December, 1900, pursuant to notice hereto attached, on the written stipulation of the parties to this cause, at the office of the clerk of the United States court, in the United States court building at Owensboro, Kentucky, to be read as evidence in the above entitled cause on behalf of the defendant The City of Owensboro.

The said witness having been by me duly sworn that the
220 evidence he would give in this cause should be the truth, the whole truth and nothing but the truth, testified as follows:

Examined by GEO. W. JOLLY, city attorney for the City of Owensboro:

Q. State your age, residence and occupation.

A. My age is 38 years; my residence is Chicago, Ill.; my occupation is that of consulting civil engineer.

Q. Are you a member of any firm of civil engineers? If so state the name of the firm and the members of the firm?

A. I am a member of the firm of Sturtevant & Todd, consulting engineers, of Chicago, Ill., composed of Geo. W. Sturtevant, Jr., F. H. Todd and myself.

Q. How long have you been engaged in your profession?

A. I have been engaged in my present profession 14 years.

Q. Have you designed and constructed any water works plants, sewerage systems, light or gas plants, or other municipal work, if so, state how many, and where?

A. I have designed and constructed, and superintended the construction of several water works systems, and electric light plants in the States of Illinois, Missouri, Kansas, Nebraska, Arkansas, Michigan, Tennessee, and Arizona. Some of these plants I will mention, namely: The water works at Princeton, Ill.; Havana, Ill.; Beardstown, Ill.; Keithsburg, Ill.; Geneva, Ill.; Waukegan, Ill.; Garnett, Kansas; Broken Bow, Nebraska; West Knoxville, Tenn.; Prescott, Arizona, and others.

Q. How many systems of water works have you superintended the construction of?

A. I believe in all 21 or 22 systems.

Q. Are you a graduate of any civil engineering school, or any school where civil engineering is taught?

A. I am a graduate of the University of Maine in the department of civil engineering.

Q. When did you graduate?

A. In 1887.

Q. Have you visited Owensboro on professional business heretofore?

A. Yes, I was in Owensboro.

Q. If so, how often and when?

A. On April 9, 1900, and a few days after that date and also before, and also in May, I think, for four or five days.

Q. While you were in Owensboro at any time did you make an examination of the Owensboro water works plant?

221 A. I did.

Q. What sort of an examination did you make?

A. I made as thorough examination as possible of the building lots of land, the battery of boilers, the pumping machinery, and connections, and the other parts of the plant which are visible but made no examination by actual excavation of the water main pipes in the streets.

Q. Did you ascertain during this examination the amount of water main pipe, or number of feet of pipe they had of the different sizes in the water works system at Owensboro?

A. Yes, I did. I ascertained this from the existing maps, and from the records and office of the Owensboro Water Works Company.

Adjourned until Tuesday, December 11th, at 9 o'clock a. m.

Met pursuant to adjournment and continued the deposition of Mr. CHARLES F. STURTEVANT:

Examined by Mr. GEO. W. JOLLY, for the City of Owensboro:

Q. I wish you to state the number of feet of pipe in the Owensboro Water Works Company's plant at Owensboro, and state now how many feet they have of the largest pipe connected with their system?

A. From the maps and data we found 400 feet of 20 inch pipe; 600 feet of 16 inch pipe, those two sections being on the suction side of the pump, and laid into the river through the tunnel, and compose the intake into the river. Then on the distribution system proper, we found 5600 ft. of 12 inch, 300 ft. of 10 inch pipe, 10750 ft. of 8 inch pipe, 60100 ft. of 6 inch, 28075 ft. of 4 inch, 13000 ft. of 3 inch. This composing the amount of cast iron pipe, in the system.

Q. State whether or not they have any two inch pipe?

A. A small amount, which is wrought iron pipe, and laid as certified, 200 ft., I think, of 2 inch pipe.

Q. I would like for you to give an estimate first of the original cost of that pipe; second, of the present value of that pipe; third, of the cost of duplicating that pipe at this time, and in doing that state

the value of it as laid down in the ground, including the excavation, lead, refilling, and all the cost of labor and material, including what you call, I believe, special castings?

222 A. I ascertained as accurately as possible the prices of pipe and supplies that prevailed at the several different times at which the plant was started, and the extension of it made, and I estimated the original cost of the system of water main pipes, not including the two suction pipes from the pumps into the river at approximately $70,040.00. This, however, does not include the valves, valve boxes and hydrants, but does include all labor, lead, hemp, etc., in laying the pipe in the ground as it is complete.

Q. It includes excavation and refilling, and all labor connected with the laying of the pipe?

A. It does. Then I estimate, in addition to that, that the total cost of the system of water main pipes, hydrants, valves, special castings, meters and taps, approximately as they existed at the time my observations were made at $86,340. And in answer to the second part of the question, I will say as to the present value of the system of water main pipes, hydrants, meters, taps, etc., laid complete, including all labor, that I estimate that price to be $76,958.00. In answer to that part of the question in reference to the cost of duplication, I would say at the present prices of cast iron pipe, special castings, hydrants, valves and supplies, and labor, the present system of pipes used in the distribution system can be made for approximately $70,000. This, however, does not include the two suction pipes from the pumps to the cribs.

Q. I would be glad if you would give a statement of the present value, original cost, and cost of duplication at this time of the pumping station, including its engines and machinery, and the pumps and suction pipes, and all parts of the pumping station as you found it there when you made your several examinations last spring in April?

Objected to by complainant's att'y.

A. Then for the original cost of that part of the system not covered in the previous sections, namely, the suction mains, intakes, power station, pumps, boilers, and all the appurtenances in and about the station, I make this as an estimate:

The power station, I estimate at	$5500 00
Pumping machinery and appurtenances	14400 00
Boilers at	3100 00
Two lots of land	2500 00

and that includes the answer to the first part of the question. I estimated the present value of the parts of the system just

223 above stated, at the figures named less three per cent. for annual depreciation of that part of the system.

Q. Please state what it would cost to duplicate that system at the present time and at present prices of material, machinery and labor?

A. I estimate that at the present prices of material, for water main

pipes, hydrants, valves, lead, labor, etc., and the present prices of pumping machinery, that the plant could be duplicated for approximately $114,230.00.

Q. I wish to inquire of you how about the valves, how many valves have they, and of what different sizes?

A. The valves in the system are as follows:

1 20 inch,
2 16 inch,
5 12 inch,
2 10 inch.
18 8 inch,
89 6 inch,
60 4 inch,
3 3 inch.

Q. What is their value approximately?

A. The approximate value of those valves I estimated at $2,003.00.

Q. How many fire hydrants have they?

A. The number of fire hydrants in the system is 161, most of the Holly Manufactory type.

Q. What is their value?

A. I estimate the value of the hydrants at $4,025.00.

Q. How many valve boxes have they?

A. 161.

Q. What is their value?

A. I estimate their value at $322.00, that is of the most modern pattern of valve boxes in place.

Q. How many water meters have they?

A. They report 103, ¾ inch meters in use.

Q. How many water taps?

A. Reported as approximately 1200 at the time my examination was made.

Q. What is the value of those water meters and water taps?

A. I estimate their value at approximately $6,840.00.

Q. They have a brick pumping station. Can you state the size of it, the outside dimensions, and its present condition and value, including the smoke stack?

A. The size of the pumping station is of brick, and is approximately 60 x 71 ft. outside dimensions. The condition of the brick stack and pumping station is such as to indicate the action of the weather, and the pumping station is, in one or more places,
224 ruptured and cracked by the unequal settlement, or other action, and the wear on the station is considerable, and some repairs are needed on that part of the system.

Q. What do you estimate the present value to be?

A. I estimate the present value of the pumping station at approximately $5,000.00.

Q. How many pumping engines have they?

A. Two.

Q. Can you state what they originally cost?

Objected to by complainant's att'y.

A. My estimate of the cost of those engines was approximately $14,400.00, although the engines were not put in place at the same time. Number one being installed before number two.

Q. What is their present value?

A. I would state their present value at approximately that figure less the ordinary depreciation for wear and tear in pumping the river water in its raw state, including the sand, etc., which the river contains.

Q. What is the ordinary depreciation?

A. That varies somewhat, but is frequently estimated at 3 per cent., and that rate per cent. will change according to the age of the engines, being constantly increasing.

Q. Do you mean to say that $14,000 was the original cost or present value?

A. Approximately the present value.

Q. Could you estimate the original cost of those engines?

Objected to by complainant's att'y.

A. The original cost as far as could be estimated from the observation I made was somewhat more than the price above stated.

Q. What sort of observation and examination did you make, was it thorough and careful?

A. I made as thorough an examination of the exterior parts of the engines as could well be made under the conditions, in the absence of sunlight admitted to that part of the engine room. The examination was made by artificial light entirely.

Q. How many boilers are there there, and what are their sizes?

A. There are three boilers at present installed, and the size of these boilers is 60 inches in diameter by 16 feet long.

Q. What are their value?

A. I estimate their value at $3,100.00.

225 Q. Please give in gross figures the total cost of the water works system as you found it here last April—total original cost.

Objected to by complainant's att'y.

A. I estimated the total cost of the system from the observations and data which we made at $111,840.00 as an approximate cost.

Q. What would it cost—the total sum, to duplicate this system? At this time, considering the present value of material and labor?

A. I estimate that the cost of duplicating the system now with equal capacity of pumps, equal sizes of water mains, equal number of hydrants, valves, etc., at approximately the sum of $114,230.00.

Q. You mean to say that that would be the cost of an entirely new plant, and every part of it an exact duplicate of the present system?

A. That is what I mean to say.

Q. I wish you to give the total value of the water works system and plant, including all of its property of every kind and description, its real estate, houses, pumping station, machinery, pipes,

engines, pumps and its pipe system—everything about it, state its present value?

A. I estimate the present value of the system, deducting for wear and tear and for repairs that would necessarily have to be made, at $76,958.00.

Q. What do you mean by repairs that would necessarily have to be made? What do you refer to?

A. In any system of water works there are certain constant repairs that have to be made to keep the machinery in proper order and ready to do its effective work at all times; not only the pumping engines, but also the boilers, and all mechanical parts of the system, which require repairs from time to time.

Q. You have heretofore made an affidavit in this case which was sworn to on the 9th day of April, 1900. In it you give a full description of this property. I will ask you to examine that affidavit, and if it is correct in all respects I desire you to file that as part of your deposition in this case.

Objected to by complainant's att'y.

A. I have examined the affidavit. I believe — is substantially correct with reference to the mechanical parts of this work, also with reference to other matters which enter into the consideration of the system, its appurtenances and surroundings, and especially as to the character of the water, the necessity for filtration and other matters of like character. I make it a part of my deposition.

Q. Mr. Sturtevant, I desire you to give an estimate of the
226 annual cost of operating the Owensboro water works system if you can do so, giving the various items in detail that enter into the cost of operating for one year, considering the price of labor, coal and material necessary to be used, basing this estimate upon the examination you made while you were here on two occasions of three or four days each time, I believe, and upon the information furnished you by the officers of the company, who were here at that time?

A. I am unable in the absence of my notes to give a detailed estimate of the number of men employed, but I made that examination at the time, also made the examination as to the amount of fuel, and I made a complete estimate of the annual approximate operating expenses for the plant at the time, and that estimate was $6,100.00 for the total operating expenses of the system, including fuel, oil, waste, superintendent and the engineer and fireman.

Q. Do you remember what you estimated the cost of the coal per annum?

A. I do not remember exactly my determination as to the cost of the coal, nor do I remember the prices given to me by the officers of the water works company, but I believe from my best recollection now without having my notes, that it was in the neighborhood of $1.00 a ton—that is for the kind of coal they used there at the station.

Q. Where are your notes?

A. At the hotel.

Q. I will ask you to go to the hotel and get your notes?

A. I will do so.

Q. Since answering the above question you have gone to the hotel and obtained your notes; now please state the total amount that you estimated for fuel?

A. My estimate for fuel consumption from data I secured during the time I was making observations of the plant was $1,000.

Q. What estimate did you make for wear and tear?

A. My estimate for wear and tear on the whole plant as an average was given at approximately 3 per cent.

Q. What would that amount to in a gross sum?

A. That would depend upon what you computed it.

Q. I am asking you to compute it on what you say is the present value of the plant?

A. Well, in computing it on the present value of the plant that would render the wear and tear smaller than it really is, allowing 3 per cent. to be the approximate wear and tear or depreciation annually.

Q. Can you give a gross figure as approximately correct for wear and tear?

227 A. Then computing on the basis of the approximate cost of the work, and 3 per cent. for the average depreciation, the amount would be $3,330.00, that is, taken as an average on the entire system as an approximate sum with which to keep it in repair, and practically a constant condition.

Q. Estimating the wear and tear on the present value of the plant, it would be something less than $2,500, would it not?

A. It would be approximately that amount.

Q. Explain to me what you mean by wear and tear?

A. The terms wear and tear are usually applied to that part of the system, or parts, which depreciate and become ineffective if not repaired, or supplemented by additional part or parts as those parts wear out.

Q. That is a sum that is annually set apart for the purpose of keeping the system in good condition?

A. That sum should at all times and under all conditions be set apart for repairs in order to keep the plant in proper working order, and from going into almost disuse from neglect.

Q. From your experience in the construction of water plants, and your observations of the system of the Owensboro water works plant, state whether or not the system, as constructed here, is so constructed as to afford adequate fire protection to this city?

A. I have already covered that point pretty thoroughly, I believe, in my affidavit filed herewith, but I would say in this connection that the size of the pipe in this system would not under the methods of standard construction, and under the best practices in the different cities and towns through the country, be regarded as ample and adequate in point of size to furnish the customary fire protection demanded and properly considered as being possible, in case of one

or more fires breaking out in different parts of the city at the same time.

Q. I understand they have in this system 60,160 ft. of six inch pipe, that is over 11 miles of six inch pipe, and they have no pipe above 12 inches. State whether or not that is not an undue proportion of six inch pipe for the Owensboro water works system for the purpose of affording fire protection?

A. I would say that I regard that amount of six inch pipe indiscriminately laid in long lines inadequate to furnish the customary number of streams for fire purposes, and the proportion under the methods of good design and construction would be greater than the allowable size or amount of pipe, namely six inch.

228 Q. Would the pipe system be more efficient for the extinction of fires if it had more large pipe in it?

A. It would.

Q. About what proportion of the system ought to be of larger pipe, and state what size pipe ought to be used?

A. In answer to that question, I will say that to give an approximate schedule of what the system in the city limits should be in order to render it adequate, I would say about 14000 ft. of 18 inch pipe, 14000 ft. of 14 inch pipe, 6000 ft. of 12 inch pipe, 8000 ft. 10 inch, 22000 ft. of 8 inch, and not to exceed 40000 to 45000 ft. of six inch laid in short lines.

Q. What do you mean by being laid in short lines?

A. Being laid in connection with the larger lines for comparatively short distances so that it would not be required to furnish an undue amount of water flowing entirely in one direction in case of a fire.

Q. Suppose two or three considerable fires should break out in the city of Owensboro at one time, along the line of this six inch pipe, would it be possible to furnish sufficient water for the extinguishment of those fires?

A. In that event along the lines of six inch pipe where from three to four streams directly from the system would be required at each fire, the size of the pipe would be entirely inadequate.

Q. State whether or not the water pumped into the water mains here in the city of Owensboro is pumped directly from the Ohio river into the mains?

A. The water comes directly from the Ohio river into the system.

Q. Have they any stand pipes here?

A. There are no stand pipes in connection with the system here.

Q. Have they any reservoirs?

A. No.

Q. Is there any mode of filtration employed by the Owensboro water works system here?

A. There is no mode of filtration, or sedimentation basins in connection with the system at present.

Q. What is meant in the water works system by "dead ends"?

A. The term dead end is not a scientific name at all, but it means the laying of a pipe in any part of the system continuously in any

direction, and terminating it at some particular point, and the pipe at that point not being connected with any other part of the system so as to furnish a circuit.

A. My observation of the condition of the pipes determined,
229 I believe, before my affidavits were given in this case, that there were two or three dead ends.

Q. What are the sanitary effect- of these dead ends?

A. The effect is that without circulation of the water a certain amount of sediment, if the water is impregnated with sediment, is more easily accumulated in the low parts of the pipe, and the use of the water for domestic purposes is not as good on account of the volume of water accumulating there in proportion to the volume drawn out. It becomes stagnant to a certain extent.

Q. It is not dangerous to health when in that condition?

A. With certain kinds of water containing a large proportion of bacteria it may fairly be said that it would become more or less dangerous.

Q. You know the Ohio river here. We have periods of high water when the river is very muddy, and the water is pumped into the mains in the city of Owensboro without filtration, does it or not necessarily deposit a very large amount of sediment in the mains?

A. It would deposit a considerable amount of sediment in the mains, yes.

Q. Now, how is that sediment to be gotten rid of after it gets into the mains?

A. The only practicable way of disposing of it, and cleaning it out, is to confine the water to one direction, in the mains, and apply force so as to dissolve the sediment out, and remove it through the hydrants.

Q. Open the mains and slush them?

A. Open the hydrants and allow the water to come out with force, after it has been conducted through the long lines of pipe with force.

Q. What do you say as to how often the mains ought to be flushed under the conditions that exist here at Owensboro?

A. I would say in addition to that question that the condition that exists here at Owensboro in different parts of the city vary, and that in the remote parts where the consumption of water is less that the mains should be flushed every week or two at least.

Q. If they are not flushed is the water dangerous to public health?

A. There are conditions under which the water would be dangerous, as I said in a former answer.

Q. I am speaking of the conditions that exist here in Owensboro. If these mains are not flushed sufficiently to take the sediment out of them, will the water be dangerous to public health?

230 A. To that question I could not make a positive answer until an examination had been made of the present character of the water, but I can say, however, that if the water is impregnated with dangerous bacteria in excessive number of quantity that

there would be danger in that part of the system where the water is stagnant.

Q. Did you examine the point at which the ends of the pipe of the Owensboro Water Works Company extended into the river?

A. I did not make an examination of the submerged parts of the pipes at the outer end of the intake, but I did make an examination of the conditions around the pumping station, and that part of the river bank in the vicinity of the intake, and for approximately two miles about the intake pipe on the south side of the river.

Q. State whether or not there is an eddy there at the point where the pumping station is located, out where the intake pipes are?

A. Just below the point where the intake pipes extend into the river there is an eddy which effects the uniform flow of the water in the river as a channel.

Q. Does the eddy extend around over the point where the intake pipes are?

A. It does not extend to the point of the intake.

Q. When the water is high in the river does it then extend?

A. No, not necessarily when the water is high, because when it is high the effect of the indentation or cove is less perceptible than when the water is at a lower stage.

Q. The Ohio river here at Owensboro flows in a circular southward course, does it not?

A. The form of the river at this point, and along the line of the city is concave towards the north.

Q. The current of the river is against the Owensboro shore?

A. It is.

Q. You say there is a cove at the point where the pumping station is situated?

A. A short distance west of the pumping station.

Q. Does it or not extend up to and opposite the pumping station?

A. At certain stages of the river the water would be seeking a point nearly opposite the west side of the station

Q. State whether or not you have had any occasion during your thirteen years' experience as a water works engineer to exam-
231 ine the rates prevailing in cities the size of Owensboro, and under conditions similar to those here, and what you would say as to the rates fixed by the city of Owensboro under the ordinance of March 19, 1900, as to their reasonableness, etc.?

A. I have had occasion in the last thirteen or fourteen years to examine the rates in several places, and prepare such rates in several places which went into effect, and I have examined the scale of rates in the ordinance you have mentioned of March 19, 1900, and it seems to me that those rates are fair and reasonable when taken altogether in connection with the conditions under which this system of water works is operated.

Q. Have you had any experience in operating water plants yourself?

A. I have.

Q. Have you operated plants similar to the one we have here in Owensboro?

A. I have for short periods of time.

Q. Is there any fault in the plan of pumping water here; could there be any improvement made on the present system of pumping water here to that at present used in this station?

Objected to by complainant's att'y.

A. The method of pumping or rather the character of the pumps, could be increased and bettered. I mean to say that there are pumps made with a higher duty that will pump more water per hundred pounds of coal, or per thousand pounds of steam, which ever method you wish to adopt, than the pumping engines in this station.

Q. Did you make any estimate of the capacity of these pumps here?

A. We took the plunger displacement or the size of the engines, and estimated their capacity.

Q. Do you know what their capacity is?

A. Pump No. 1 is said to have a capacity of 2,000,000 gallons per day, and the other approximately four millions.

Q. How old are these pumps; I mean how long has it been since they were built and put in the station?

A. I cannot answer that question just now without reference to my notes.

Q. About how long?

A. I think that pumps No. 1 has been in about eight or nine years and No. 2 about 4 or 5 years. That is from the best of my recollection.

232 Cross-examined by Mr. CLARENCE FINN, on behalf of complainant:

Q. You are a civil engineer, I believe?

A. I am.

Q. Have you ever taken a course in mechanical engineering?

A. No further than what is offered in the department of civil engineering and in connection with that.

Q. Have you ever taken a course in hydraulic engineering?

A. That comes in connection with civil engineering.

Q. They are three separate and distinct professions, are they not—mechanical, civil and hydraulic engineering?

A. You could not state that they are three separate and apart, because each one of them, when classed as a profession has such a relation to the others as to render it impossible to separate them. Each one merges over into the other, calling for certain uniform knowledge of mechanics, etc., which cannot be left out from any one of them.

Q. But men make specialties of each one of the three?

A. Yes.

Q. When did you first examine the Owensboro water works plant?

A. I think it was a few days previous to April 9, 1900.

Q. What examination did you make, and at whose instance did you make it?

A. At the instance of the city authorities of the city of Owensboro.

Q. What examination did you make?

A. I examined as far as possible the system of water main pipes, hydrants, their position, the location of the valves, the location of the pumping station, the location of the intake pipes with reference to the shore of the city, and the pumping machinery, etc.

Q. With reference to the pumping station, and the appliances connected with it, what examination did you make of that?

A. We made the examination of the pumping machinery and appurtenances to make the leading measurements of the dimensions, so as to ascertain the make and character of the machinery, the size of the different parts which bear upon its design and capacity.

Q. How many pumps have they?

A. Two pumping engines proper.

Q. Of what make?

A. The number two is made by the Buffalo Steam Pump
233 Co., and number one was, I think, without going back to my notes, and afterwards rebuilt and extended by the New Albany Pump Co.

Q. What did you estimate those two pumps at?

A. I believe approximately $14,400 on the two pumps and connections.

Q. What is the value of each one separately?

A. I think I made an approximate division of $4,500 and $10,000.

Q. The $4,500 for pump No. 1 and $10,000 for pump No. 2?

A. Yes.

Q. Have you ever had occasion, in your experience as an engineer to find the value, or the cost of a pump like pump No. 2?

A. Yes, we have had occasion to ascertain the cost of construction of a pump of that character, or a similar character.

Q. Of that identical pump No. 2, have you ever had from the house that manufactured it the estimate of its cost, or of reproducing the same pump?

A. We have estimates on approximately the same thing; I do not know about the identical duplicate of that pump, because there are very few of that particular design. They are generally designed with certain parts not interchangeable.

Q. You do not know the cost of building that pump?

A. I know the approximate cost.

Q. Where did you get that information.

A. We have the cost of pumps of that capacity for comparison from the different pump dealers who build pumps of that capacity and design.

Q. Describe pump No. 2; what sort of a pump is it?

A. Pump No. 2, built by the Buffalo Steam Pump Co., is a cross-compound duplex pump, flywheel pattern, condensing.

Q. Is it a horizontal pump?

A. Vertical.

Q. Is it a deep well pump?

A. Not strictly speaking.

Q. Do you know its elevation?

A. It has a circular pit, 42 feet deep and 18 feet in diameter below the engine room floor, and the walls of that pit in which the pump is located is of steel or iron.

Q. It has a basin underneath it of steel?

A. No, the walls of the pit are steel or iron, the bottom is concrete.

Q. How does the pump get water?

234 A. It is connected with the 20 inch section main through the tunnel into the river.

Q. Does it take water directly from the intake pipe as it comes from the river, or from the wells you have been speaking of?

A. Number 2 pump takes water direct from the well as I remember.

Q. As to the value of this pump, is it not a fact that the same manufacturer who manufactured this pump sold this identical pump and sells it to-day at from $25,000 to $30,000?

A. At the present time the Buffalo Steam Pump Company is not in existence. It has been merged into another pump concern. It is uncertain whether they have any of these patterns in use or not.

Q. Up to the time it went out of existence was not the value of this pump from $25,000 to $20,000?

A. I don't think the pumps would be worth that much.

Q. Did they not sell for that much?

A. That I am unable to state.

Q. As to pump No. 1 what capacity has it?

A. It was given to us as having a capacity of 2,000,000 gallons per 24 hours.

Q. Who gave you the information upon which you based your estimates?

A. Part of that was given us at the office of the water company by the superintendent, Mr. Martin, and part by the mechanical engineer at the works, Mr. Williams, and the balance of the information we obtained by actual measurement where the parts were accessible without going to a considerable expense in moving parts of the system, which we did not care to do.

Q. What is the value of pump No. 1?

A. It is approximately what I stated in my former answer, $4,500.

Q. What did that pump cost and what does it sell for by the manufacturers to-day?

A. It is not manufactured by any of the manufacturers to my knowledge at this time.

Q. Have you ever figured upon replacing a pumping station with two pumps identical with the two pumps here?

A. I have made an approximate estimate.
Q. Of exactly the same thing?
A. I have estimated both ways.
Q. You do not know at the time this pump No. 1 was made, having a capacity of 2,000,000 gallons per day, what the price was upon the market for that pump then?
235 A. The only method we had of determining that was to make an approximate estimate of it from the prices that prevailed at that time, and on that class of machinery. We were unable to determine its actual contract price.
Q. Do you know whether it was sold upon the market by the manufacturers at something near $20,000, or something more than that at the time?
A. I should think not.
Q. Not being strictly a mechanical engineer might you not be mistaken as to the estimates you have made as to the value of machinery?
A. I believe not. The mechanical engineering feature is not one that is widely apart from the profession of a civil engineer. In this department he has to deal with those prices all the time in connection with any system of water works, and must of necessity have a knowledge of machinery, as well as other parts of the system.
Q. Are you familiar with the manner and time at which these two engines were placed in the water works company's building here?
A. I do not know the exact date when they were placed in the building.
Q. Do you know the conditions under which they were placed there, and what it cost the company to place them there?
A. No further than my estimate.
Q. In your estimate did you take into consideration the cost of building a temporary pumping station in order to supply the city with water when those two engines were put in, or rather pumps?
A. I did not receive any information from the company or its employés, as to the pumping devices, or the engines, or either of them, while they were erecting the engines. That would be incidental to the construction, and no trace of the false work, or temporary work is visible so far as I know.
Q. It would be necessary, however, in replacing an engine, to make some provision by which a temporary station could be built in order to supply the city with water?
A. In the event of the system of water works being in use and provided with a single engine, and it became necessary to occupy that space and erect another, then the works would either have to be closed down or temporary works provided.
Q. In order to keep in operation, temporary works must be provided, temporary engines?
236 A. Yes.
Q. And that is a legitimate expense in estimating the cost of the new machinery, is it not?

A. It would not usually be grouped in with the construction of a new plant and enter into a contract for that construction, but would more naturally, in all cases that I have been connected with, and have observed, be grouped in with the other expenses of the company, because the builders would hardly attempt to operate and furnish water temporarily while they were erecting a new engine.

Q. Have you ever in all your experience as an engineer seen the exact duplicate in operation of pump No. 1 or No. 2 as now exists in the city of Owensboro?

A. I do not know that I have ever seen the exact duplicates in design or measurement of either of those pumps, because they are special. I mean to say that they do not correspond in their exact build and design to any of the standard pumps which take their place in capacity and duty as built by the other companies.

Q. How many wells are there in the pumping station up there?

A. Two, as I have the notes in connection with the two engines.

Q. Did you go down into these wells and examine that construction?

A. No, we could not approach those wells with any means we had at hand without further light.

Q. Could you get into them?

A. They are accessible.

Q. Do you know anything about the construction of those two wells?

A. No more than was given in detail by the authorities and the parties interested.

Q. State what they told you about them?

A. Nothing was given further than a general description of the method of obtaining the water, and that the intake was bare, or only partially protected on the outer end by a screen, and as I remember, the pipes were laid a part or all of the way on rock.

Q. I am speaking about the construction of the wells?

A. That construction, as I have the notes, is concrete on the bottom.

Q. Give me the dimensions of those two wells?

A. Number one is erected in a pit 35 feet deep below the grade of the floor, and is ten feet in diameter, the walls being of metal.

Q. What sort of metal?

237 A. Either steel or iron. I do not know whether I determined whether it was steel or iron, but that would be immaterial, because either would answer the same purpose.

Pump number two is erected in a pit as described above, 42 feet deep below the floor line, 18 feet in diameter, with metal sides.

Q. What is the thickness of those metal sides?

A. I have it for one but not for the other. For number two it is three-fourth inch at the bottom and three-eighth inch at the top. Those were the figures given me by Mr. Williams. I think it was not possible to get at either end, certainly not at the bottom or top, without some difficulty.

Q. Do you know the material of which those well sides are constructed?

A. Either steel or iron.

Q. How about the relative cost of the two?

A. That would not be a matter of much difference.

Q. Could you estimate from the examination you made, the cost of construction and the value of each one of those two wells separately?

A. I did not make an itemized estimate of the cost of those wells, but made a general estimate of the construction of a work of that magnitude and design.

Q. Is that included in the cost of the engines?

A. Yes.

Q. How much did you set aside as the probable estimated value of the two wells?

A. I do not recollect the exact division of my estimate on those two wells. I have not those notes with me.

Q. Do you know how much excavation was necessary, and the character of excavation necessary to build those two wells, and how much it cost to do that sort of work?

A. The only thing that I was able to ascertain in that connection was that the material was composed of layers of sand and clay, particularly river deposit, and presented some difficulty in sinking the caissons in some of the pits.

Q. You have no idea of the actual cost of the work?

A. I have an idea of the cost, yes.

Q. Did you make any allowance for the incidental expenses in your estimate of the cost of those two wells from the quick sand, etc.?

A. In a general way, so far as we were able to determine pretty nearly the character of the material in that formation.

238 Q. How can you tell from an examination what amount of difficulty would be incurred in making a structure of that character?

A. There is no way of telling ahead of time except by making what we call borings, and keeping an exact account of your depth, and the character of formation at the various depths. That is the customary way of arriving at the difficulty that will probably be encountered in an undertaking of that kind.

Q. These wells may have cost a good deal more then than you allowed for?

A. To the contractor who sunk them they may have been more expensive than they would ordinarily be estimated.

Q. Now, as to the suction pipe and tunnels to both wells, where does the suction pipe extend into the river?

A. Practically on the north side of each pump.

Q. How far into the river does the intake pipe extend?

A. The first one was given to me at 400 ft. of 20 inch pipe, and the other 600 feet of six inch pipe. But we made no examination of the cribs at the end, because they are submerged and inaccessible.

Q. Does that intake extend beyond the middle of the river, the end of the intake pipes?

A. Not beyond the middle of the river, no.

Q. How wide is the river up there?

A. I am unable to state just now. At the low stage it might be a half or three-quarters of a mile wide, probably less.

Q. I believe you said the current of the river came to the Kentucky shore?

A. Yes.

Q. Does that intake pipe extend beyond the current of the river?

A. Well, not necessarily beyond the current of the river, because the current of the river is more or less uniform without its entire width. The velocity would probably be greater near the Kentucky shore.

Q. The greatest velocity would be between the end of the intake pipe and the Kentucky bank?

A. I am unable to state. That, however, would depend upon the depth of water at different distances from the shore, the less the depth of water the greater would be the inequality of the velocity in the general direction of the river.

Q. How are those tunnels constructed?

A. From the notes I received, they were of masonry construction.

239 Q. Do you know how long they are, their dimensions?

A. I do not remember at the present time the dimensions of those tunnels.

Q. You have never made a personal examination of them?

A. We were unable to get into them.

Q. You do not know what they cost from your own personal knowledge?

A. I was unable to secure the contract price of them from the company, and I could simply make an approximate estimate of their cost.

Q. I will get you to make a detail estimate of the value of those parts of the pumping station that I ask you of, as near as you can, that go to make up the estimate that you have given of the value of the pumping station in your direct examination by Mr. Jolly. The value of the pumps is placed at what?

A. In my direct examination, I grouped the pumping station proper in one figure; the pumps and appurtenances in another, and the intake pipes in another, with their connections.

Q. Can you give the estimate of the pumps alone?

A. I have not that division at hand.

Q. Can you give an estimate of the wells alone?

A. I have not any of the divisions at hand which I estimated.

Q. Can you give an estimate of the suction pipes and tunnels to both wells alone?

A. I placed my estimate and division for those items, as I remember it now, at $7,400.

Q. Suction pipes and tunnels?

A. Yes, the parts outside of the station proper, and the pumps.

Q. How much pipe is embraced in that estimate?

A. The quantities as stated above—400 ft. of 20 inch and 600 ft. of 16 inch.

Q. What is the value of the pipe alone that goes to make up the suction pipe?

A. I believe that my estimate of the pipe was at the rate of $24 a ton, as I believe our quotations at that time were approximately that, and the weight of that pipe, 16 inch, is 125 lbs. per foot. This could be carried into tonnage, and deducted from the total, leaving a balance for the construction.

Q. You only allow in your estimate $24 a ton for that pipe, do you?

A. I believe that is my estimate.

Q. As a matter of fact, in April, May and June, possibly a
240 little prior to that time, was not pipe selling at $32 a ton?

A. I do not know of any points where pipe at that time was selling as high as $32 a ton. It is now quoted at $24 a ton and less.

Q. Did you attempt to find out the price of pipe per ton at that time?

A. We had the prices of pipe at that time at various points where the freight rates are not in excess of the freight rates to this point.

Q. As a matter of fact, was not the city of Louisville buying pipe at that price at the same time?

A. I am unable to state whether that price was paid for cast iron pipe by any city; and as I said before, I do not think it sold to any of the older departments for as high as $32 a ton.

Q. Do you know whether cities were paying that much for cast iron pipe or not at that time?

A. I am unable to reply to that exactly; but I do know that some of the city departments paid pretty liberally for their pipes, because they had prepared and let contracts for extensions, and were compelled to take the pipe.

Q. As a matter of fact pipe varies in value a great deal, does it not, as it has in the last few years?

A. Not for so long a time as a few years. The variation in the pipe has been confined mostly to two or three years. I purchased cast iron pipe in central Ohio as low as $14.70 a ton delivered, about three years ago, but I am aware of the fact that since that time it has had varying prices.

Q. Do you know the dimensions of those tunnels?

A. I am unable to state.

Q. You can not give any approximation as to their value?

A. Not without going back to my notes.

Q. Did you ever have the information as to the size of these tunnels?

A. Those dimensions were given at the time the city made an examination of the works there on two or three different occasions, and

were stated to the different parties and city officials, including myself who went there to make the examination.

Q. Have you a separate estimate of the boiler plant?

A. I believe I have a separate estimate of the boiler plant and place that at $3,100, as I think it is placed in my affidavit.

Q. Does that include pipes and fittings?

241 A. Yes, that would naturally go in immediate connection with the boilers.

Q. As to the pumping station?

A. My estimate on that was $5,500.00.

Q. Does that include the tools and appurtenances?

A. It did not include any such tools as are used in firing, etc.

Q. Did it include the brick chimney?

A. Yes.

Q. As to the pipe system in the city of Owensboro, upon what did you base your estimate as to its cost of construction?

A. Do you mean in the department of labor and material?

Q. You say that it would cost so much to produce the distributing system of pipe of the Owensboro Water Works Co., upon what did you base your estimate—upon any details that you have?

A. No, from my own previous notes that I made of the actual cost.

Q. That, of course, depends upon the price of pipe, the cost of labor, etc.?

A. Yes.

Q. The condition of the geography of the place in which the pipe is laid?

A. The cost would depend somewhat upon the character of soil bearing upon the character of excavation.

Q. All these go to make up the cost of laying pipe?

A. They have to be taken into consideration in each individual case in order to determine the cost?

Q. And the season of the year?

A. Yes; that is a factor.

Q. Therefore, you could not establish a table that would be absolutely correct as to the cost of laying the pipe?

A. I could make a table for the cost of construction of this pipe system, taking into consideration all the natural conditions, and assuming the prices for material as uniform, and supplementing that by a certain amount of cost for contingencies, to cover all the changes that would result from the season of the year.

Q. That would only be applicable to the city of Owensboro and not to other places?

A. That would be made especially with reference to the city of Owensboro.

Q. Have you ever had any experience in laying pipe in the city of Owensboro?

A. No.

242 Q. You were asked as to the proportion of the six inch pipe to the other sized pipe in the piping system here, I will ask you if there is any rule in civil or mechanical engineering by which

you can state that there should be such and such a proportion of any one size pipe in the structure of a water works system, in any special place?

A. The only rule that governs in the proportionate size of pipe in any water works system is your practical knowledge of the service demanded of that system at the time of construction, and for future growth. The system is then designed, and can be designed successfully to meet those requirements by hydraulic rules.

Q. Have you any personal knowledge of the amount of volume of water necessary to be carried through any one street of the city of Owensboro?

A. I can determine from the character of the property what size pipe should be laid on any or all streets in a properly designed system of water main pipes for the adequate distribution of water.

Q. Would that depend altogether upon the quantity of water to be furnished through those pipes?

A. The number of fire streams required, and the quantity of water would have to be taken into consideration.

Q. You do not know, and have no way of knowing, the number of consumers of water upon any given street in the city of Owensboro?

A. I have no minute knowledge of the number of water takers or private consumers, on any one street in the city.

Q. Have you ever seen a practical test of the water works plant in the city of Owensboro?

A. I have not.

Q. Do you know whether or not it is a fact that the service in the city of Owensboro of the Owensboro Water Works Co., is as efficient as it is in any city of its class in this, or any other State, and that the insurance rate is as low, or lower in the city of Owensboro than in any city of — class in the State?

Objected to by defendant's att'y.

A. I am unable to state what the insurance rates are in the city of Owensboro, in comparison with those of other cities or towns of its class in this or other States. I am able to say, however, that on account of the limited size of the different kinds of pipe here, that it is not possible that the fire service in this city should be equal to the fire service in other cities and towns where the size of the pipe are larger, and the velocities of flow in those pipes is less than in this city when in use.

243 Q. What is the ordinary pressure in the mains in Owensboro?

A. It was given to us as 60 lbs. ordinary domestic pressure, which was intended to be kept up constantly, and from 80 to 125 lbs. for fire pressure.

Q. Do you know of any practical illustration of the lack of efficiency in the Owensboro water works system as a fire protector to the city and its property?

A. I have not had occasion to observe the action of the plant in

the event of any fire where its capacity was tested, but I am able to state that results could be developed in the system at fixed points with reference to the quantity of water furnished and the pressure applied at the pumping station.

Q. In your direct examination, you stated that in the event of three or four fires occurring at the same time, that the water works system would be inadequate. As a matter of fact, could not there be a sufficient number of fires in any town or city to absolutely destroy the protective influence of any water works system?

A. It is rarely the case in any city or town where the fire protection is ample and the pipe system and the machinery are well designed, that such a conflagration occurs as to destroy the entire city, or nearly the entire city. It sometimes occurs, however, in cities and towns, that a fire will for a time get the upper hand of the department under any and all conditions.

Q. As to the operating expenses you have estimated, do you know how many officers are necessary to the successful operation of the Owensboro Water Works Co., and how many employees are necessary for its successful operation?

A. I know the number of men I would put in the different positions if the management was under my control.

Q. You do not know how many are in actual employment, or whether or not they have too many?

A. No further than I was told when we made our examination, by the officers resident in Owensboro. Outside of that I am unable to state what officers exist, or where.

Q. Your estimate was made from the data furnished you, and not from any personal knowledge you have of the conditions surrounding Owensboro?

A. It was based upon both.

Q. Is not it necessary or customary, for all corporations engaged in any business, to have a president, and treasurer, and book-keepers, etc.?

244 A. It is both customary and necessary in a business of any considerable magnitude that a sufficient number of officers be employed to successfully carry on the business?

Q. Did you make any such allowance for any such officers as that in your estimate?

A. I made no allowance for a president, or any other than the resident superintendent and the engineering force.

Q. How many employés did you allow in the city of Owensboro then?

A. Five in all.

Q. In what positions?

A. Superintendent, chief engineer, and his assistants.

Q. Three assistants?

A. Yes, that was what was indicated to us.

Q. In that estimate did you allow for any attorneys' fees, or any incidental expenses except salaries of the employés of the company, together with the fuel, oil, etc.?

A. I made no allowance for attorneys' fees, or any irregular fees, but did include all the minor cost, and small repairs, coal, oil, waste, labor, etc.

Q. Do you know how often the mains are required to be flushed and hydrants inspected in the city of Owensboro?

A. I think the ordinance requires as much as once a month part of the year, and twice as often for other parts of the year, that is during the warm season.

Q. That is an incidental expense, is it not?

A. That is a trifling expense.

Q. Did you make any allowance for that?

A. The estimate I made would cover that expense, I think, by using the same hands that are employed at the station.

Q. Did you arrive at the expense of the office—stationery, office rents, etc.?

A. I made no allowance for any other expense except what I have indicated here.

Q. Did you make any allowance for the collection of water bills, reading meters, etc.?

A. That is included in the items here as being part of the duties of the officers and employés named.

Q. Is it not possible that there would be a little more work to be done than that many men could perform?

A. I believe not.

Q. Is it not necessary to hire extra labor on some occasions, and to incur other and greater expenses than you estimated here?

245 A. There are conditions and times when it is necessary to have an extra man or two in making any considerable extension of pipe, and in connection with similar things which are usually grouped in with the construction in the extension department.

Q. Is it not an incidental expense that is frequently necessary to call in an expert engineer to repair pumps—is not that a running expense?

A. That might be allowable in case of any considerable or extended repairs, or rebuilding; but usually not allowable in every day operation when the pumps are in fair condition.

Q. In all machinery is not — the case that serious injuries and breakages happen which require the attention of experts who are usually not in the employ of water works companies?

A. I would not say that occurs frequently, but occasionally, for instance a boiler explosion, or the pumps might get out of order, or the valves get out of order in such a way as to be beyond the immediate possibility of the customary force repairing them.

Q. You never can tell when these accidents are going to happen?

A. No one can tell ahead of time, of course.

Q. Are you familiar with the water rates that are charged in towns of a similar class as Owensboro, and in larger places?

A. Yes.

Q. Do you know the rates charged in Louisville, Ky.?
A. No.
Q. Frankfort, Ky.?
A. No.
Q. Paducah, Ky.?
A. No, nor in any Kentucky town, so far as I can state at the present time.
Q. Do you know the rates in Nashville, Tenn.?
A. No.
Q. Evansville, Ind.?
A. I at one time examined the rates there, and have a copy of them in my office, but would be unable to recite them one by one at the present time. I believe, however, that the rates in Evansville are about the average of water rates in towns of its class.
Q. What is the water rent for a four-room house in Evansville, Ind.?
A. My recollection is that a flat rate would be approximately $5.00.
Q. According to the proposed ordinance, what would the rent be for a four-room house in Owensboro?

246 Objected to by defendant's att'y.

A. The rate would be approximately $2.00 for the first four rooms, and then an additional price per room for the other rooms.
Q. Then the Evansville rate is a hundred per cent. higher for a four-room house?

Objected to by defendant's att'y.

A. I could not state positively. I give that from my best recollection.
A. I could not state positively. I give that from my best recollection.
Q. Are you familiar with the rates at Nashville, Tenn.?
A. No.
Q. Indianapolis, Ind.?
A. No.
Q. Knoxville, Tenn.?
A. I was at one time familiar with the rates there in the old city, because I had occasion once to examine its rates, bearing upon the rates that were established in the system of West Knoxville, Tenn., where my brother and I constructed the water works, but I am unable to state how those rates run. My impression is that they were fair, and ranged a little high so that in some instances the new water company made a reduction in their rates.
Q. Do you have any recollection at all of any of the rates at Knoxville, Tenn.?
A. I could not remember now, but my general recollection is that they were fair, uniform and satisfactory in almost every respect.
Q. What is the rate under the proposed ordinance, for an eight-room house?

Objected to by defendant's att'y, because the ordinance is a part

of the record in this case, and shows for itself the rates prescribed therein, and it is not competent for the witness to state what the ordinance itself shows.

A. As I would interpret section 2, the rate would be $2.00 for the first four rooms, and fifty cents each for the second four, making a flat rate of $4.00 per annum; however, in the event of the use of a meter, the rate might be different.

Q. Without the meter, the rate under the proposed ordinance for an eight-room house in the city of Owensboro would be fixed at $4.00?

A. That is my present interpretation of this ordinance as I have said.

Q. Do you not know that for an eight-room house in Knoxville, Tenn., the flat rate is $9.00?

247 A. I am unable to state from my recollection of the old Knoxville ordinance what that rate would be.

Q. Do you not know that that rate in Winchester, Ky., for an eight-room house would be $10.00?

Objected to by defendant's att'y.

A. I am unable to make any statement with reference to that rate.

Q. Do you not know that in every Kentucky town of any size that the proposed rates in Owensboro are from 33⅓ to 100 per cent. less than the rates fixed in other Kentucky towns for furnishing water, either by private corporation or by the city furnishing water to its inhabitants by works of its own?

A. I am unable to state whether that is true or not.

Q. Then you have made no examination or effort to find out what the rates are in any Kentucky towns, other than the city of Owensboro?

A. I have made no special examination with a view of comparing the rates adopted under the ordinance of March 19, 1900, in Owensboro with those of towns larger or smaller in Kentucky.

Q. You have had experience in operating and constructing a great many water plants, have you not?

A. I have constructed several in the last 14 years.

Q. If you know of any such plants, give the name of it which permits the water rents to be collected after its service to the consumer, at the end of the year?

Objected to by defendant's att'y.

A. There are some. Chicago collects for the water after it is delivered. St. Louis, and several other places where we have constructed works, do so.

Q. After the period of one year's service?

A. Sometimes at the end of the year, and sometimes at the end of six months.

Q. Are not the water rents in Chicago secured by a lien upon the property?

Objected to by defendant's att'y.

A. I think not.

Q. How are those water rents secured?

Objected to by defendant's att'y.

A. The city owns the works in Chicago, and there is no particular security for the water rent. In the event the user fails to pay, the water is shut off.

Q. What good would it do towards collecting the rents to shut off the consumer's water after the water had been furnished to him?

Objected to by defendant's att'y.

248 A. In answer to that question, I could only say that it would probably do no good with reference to the amount due, but in the event the consumer was compelled to have the use of the water in the premises, he would likewise be compelled to pay under such a rule all former or previous rentals before the water could be turned on again.

Q. Is it not a fact that unless water rents are collected in advance, that a great percentage of the water rents are lost to the company furnishing the water?

Objected to by defendant's att'y.

A. I would hardly be willing to state that a great per cent. would be lost, but there is no doubt but that a certain per cent. would be lost for various reasons.

Q. Is it not almost a universal rule that water rents are paid in advance especially in this portion of the country, or any portion of the country?

A. I would not say that in the majority of cases, rates are collected in advance. It will as often occur and be the rule one way or the other. But it is, however, the rule with franchise companies to collect in advance, if permissible by ordinance.

Q. Is it not in ninety per cent. of the cases permissible?

Objected to by defendant's att'y.

A. Answering that, I would not say that the per cent. would be so great.

Q. Have you ever looked up the percentage in those towns that are allowed to collect their rents in advance?

A. Only in a general way, stating from my experience that now but very few companies and cities, with which I have been acquainted, have adopted the rule for payment of rates in advance, but have frequently made the rule that they should be paid quarterly.

Q. I am not referring to meter rents, but assessment rates. Are not the assessment rates of franchise companies, and by a great per

cent. of cities where they own their own works, made payable in advance?

A. I would not say a great per cent. or a majority.

Q. Could you say that the majority was not so made?

A. I am of the opinion that a majority of the rates, including franchise and municipal works are collected after the service is rendered.

Q. Is not the permission, by ordinance, to franchise companies always given to collect their rates in advance?

A. Not always given.

Q. But nearly always given?

A. I have prepared them both ways.

Q. Are you familiar with the rules of the company that prevail in Louisville, Ky.

249 A. No.

Q. Henderson, Ky.?

A. No.

Q. Hopkinsville, Ky.?

A. No.

Q. Princeton, Ky.?

A. No.

Q. Or any town in Kentucky?

A. No. I do not know that we have any of the rates in our office in tabulated form for the purpose of comparison, of any of the Kentucky towns, and I would make the same answer as to the rules.

Q. State the names of all the towns you know of where they are allowed to pay their rates subsequent to the rendering of the service?

Objected to by defendant's att'y.

A. I could not state or make a very valuable answer to that question, without going back to my memorandums, and tabulations, and extract from *the* such data as would assist my memory in making an answer to the question.

Q. Would an ordinance that took away from a company the right of discretion to attach a meter to a certain man's premises by an unreasonable regulation?

A. I could not make a positive answer to that question, but can state that rules have frequently been adopted where the right to attach a meter was given; and in other rules at other places, that right had been denied, and I am not prepared to state in this particular case that the denial of that right would be unreasonable.

Q. Are not a lot of customers wasting water, in many cases, regardless of the rights of the company?

A. There is no doubt that the free use of water under a flat rate sometimes results in unnecessary waste.

Q. Is it not reasonable to allow a water works company to attach a meter to such consumers as willfully and wantonly waste water?

A. I would reply to that question by saying that if the adoption of the meter would serve in a general way to prevent the waste,

then its adoption would not be unreasonable, or the rule allowing the company to attach them at pleasure.

Q. Would not the attachment of a meter serve to check the waste of water?

A. The general result is that the meters under fair rates will tend against the waste of water.

Q. Would not the ordinance that took away from the water company the right to attach the meter in such instances be an unreasonable ordinance?

250 A. I am not prepared to state that it would at the present time.

Q. Do not a great many water works companies make the consumers of water pay for the meters and the repair of the meters, and for the taps made?

Objected to by defendant's att'y.

A. The rule exists in effect both ways, namely, that sometimes the consumers are required to furnish the meters and pay the cost of their installation and repair; while sometimes the companies furnish the water meters and pay all the similar cost.

Q. In those towns in which the consumer pays for the meter and taps ought not that be taken into consideration in going to fix the amount of water rent that is paid by the consumer?

A. It occasionally occurs that meters are attached in an effort to prevent the waste of water.

Q. Does not this proposed ordinance make it obligatory upon the water works company to furnish the meters free of charge and taps free of charge, and keep them in repair?

Objected to by defendant's att'y.

A. As I understand it, the water works company is to furnish the meters, and bring the taps within a certain fixed line free of charge.

Q. And keep the meters in repair at all times.

A. I do not just now remember whether the repairs are to be bourne by the water works company or the consumer.

Re-examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro:

Q. Mr. Sturtevant, I wish you would take the ordinance about which you have been talking, and about which you have been examined over my protest, and tell me what it would cost a water consumer in Owensboro under that ordinance, having a house with four rooms in it?

A. As I understand it, the first four rooms would cost him $4.00 and then 50 cents for each additional room.

Q. Then, if he should have a kitchen sink, that would cost him $2.00, would it not?

A. Yes.

Q. And if he should have a water closet in his house that would be $2.00, would it not?

A. Yes.

Q. If he should sprinkle, and had a front of say 45 feet,
251 and sprinkled the lawn and street, say 50 feet of sprinkling in front of his house, which would make about 550 square yards, that would cost him $2.50 additional?

A. Yes.

Q. It would cost him $8.50?

A. Yes.

Q. Now, that sort of service would be very common for a small cottage, would it not?

A. For a house or cottage having plumbing, the chances are that it would be supplied with those attachments. It might or might not.

Q. Take an ordinary poor laboring man, who lives in a small house with five or six rooms, he would pay $3 first, and then $2 for each of these additional services of closet and sink, and then for the sprinkling probably $2 or $3 per annum?

A. That's about the way the service would be in small inexpensive cottages.

Q. In making your estimate of the cost of operation, I will ask you if you did not place the salaries of the chief engineer and superintendent at $2,400, lumping them together—$2500.00 maybe?

A. I placed them at $2,700.00.

Q. Now the night engineer, and extra fireman, what did you give for that?

A. I placed that item at $1,642.00.

Q. Waste, oil, horse and wagon at $100 and possibly more?

A. I included in the above the salaries and wages and coal, and the balance of $758.00 put against the minor expenses, small repairs, oil, waste, etc.

Q. What did you estimate the coal at?

A. $1,000.00.

Q. Did you also in making that estimate put in the office expenses, clerk hire and office rent at $560.00?

A. I believe $758 was set against the office rent and minor office expenses.

Q. Well, clerk hire, at $30 a month, office rent at $200 per annum, stationery at $140, makes $700.00. That makes about $6,100 or $6,200?

A. Yes.

Q. You were asked about access to the station, and what examination you made, did you have any difficulty in getting access to the station, and making examination for the city?

Objected to by complainant's att'y.

A. We had some apparent difficulty in getting access to the station for the purpose of examination.

Q. Was it refused to you at first?

252 Objected to by complainant's att'y.

A. Yes.

Q. Did not the city authorities have to apply to Judge Evans to get an order for you to examine the station?

Objected to by complainant's att'y.

A. That is my understanding.

Q. In the company's office here where the superintendent and officers are, did they give you access to any of their books and accounts, showing the gross income or net income of the business?

A. I was not able to obtain any of that information from them, or see any of the books which pertained to the financial part of the management.

Q. They have an office here in Owensboro, have they not?

A. They have or did have in April, 1900.

Q. Is it not a fact that you were here on two or three different occasions, spending several days for the purpose of making an examination of the water works plant and system of the Owensboro Water Works Company?

A. Yes.

Q. Who was with you, do you remember, when you made that examination?

A. Yes, Mr. Cummins, Mr. Shively and Mr. Weigal, and one or two members of the city council.

"Signature waived."

On the back of said deposition is the following indorsement, to wit: Filed Dec. 28, 1900. Thomas Speed, clerk, by Dudley Lindsey, D. C.

Also the deposition of Mr. James P. Weigal, taken on Wednesday, December 12th, at the same place, and for the same purpose.

Examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro:

The witness first being duly sworn deposes as follows:

Q. State your age, residence and occupation?

A. 69 years; residence, Henderson, Ky.; occupation, engineer and contractor.

Q. How long have you lived in the city of Henderson?

A. Ever since 1857.

Q. Have you ever had any connection with any water works system?

253 A. Yes, the Henderson water works, was superintendent there for about 17 years.

Q. How far is the city of Henderson from Owensboro?

A. About 30 miles.

Q. What is the population of the city of Henderson?

Objected to by complainant's attorney.

A. About 12000, I think.
Q. Has the city of Henderson a water works plant?
A. Yes.
Q. How long has she owned and operated a water works plant, Mr. Wigal?
A. I think it was built in 1875 or 1876.
Q. Are you familiar with the Henderson water works system, its pumping station and machinery, engines, pipe system, hydrant, valves and pumping apparatus?

Objected to by complainant's att'y.

A. I think so.
Q. During the 17 years that you were superintendent of the Henderson water works system, did you have anything to — with any pipe laying of the system, or the construction of any part of its machinery?

Objected to by complainant's att'y.

A. Yes, I laid some 12 or 15 miles of pipe, and had charge of laying it, and put in two engines while I was there—pumping engines.
Q. Can you describe the pipe system of the Henderson water works?

Objected to by complainant's att'y.

Q. What are the largest pipe in the system?
A. 24 inch is the largest.
Q. How many feet of 24 inch pipe are there in the system?

Objected to by complainant's att'y.

A. About 2200 feet of 24 inch pipe.
Q. What is the next largest size?

Objected to by complainant's att'y.

A. 20 inch.
Q. How many feet of 20 inch?
A. 9340 as measured by the city engineer.
Q. Has there been any 20 inch pipe laid in the system since you went out as superintendent?

Objected to by complainant's att'y.

A. No.
Q. What is the next largest size pipe?

Objected to by complainant's att'y.

A. 12 inch.
Q. How many feet is there of that?
254 A. 17400.
Q. How many feet of 10 inch pipe?
A. There is about 900 feet.

Q. How many feet of 8 inch pipe?
A. 600 feet.
Q. How many feet of six inch pipe?
A. 2500 ft.
Q. How many feet of 4 inch pipe?
A. 28800.
Q. How many feet of 3 inch pipe.
A. 14400.
Q. Have they any other pipe of any other size?
A. Yes, there is a five inch pipe, that I did not make a statement of above.
Q. How many feet of 5 inch pipe?
A. 1950.
Q. I will ask you to state the whole approximate cost of said pipe laid down in the streets of the city of Henderson?

Objected to by complainant's att'y.

A. I have never made an estimate of that. I would say $8,000.00 for the 24 inch.
Q. For the 20 inch?
A. $27,000.00.
Q. For the 12 inch?
A. $27,000.00.
Q. For the 10 inch?
A. $1,100.00.
Q. For the 8 inch?
A. $600.
Q. For the 6 inch?
A. $17,000.00.
Q. For the 4 inch?
A. $14,000.00.
Q. For the 3 inch.
A. $4,500.00.
Q. For the 5 inch?
A. $5,260.00.
Q. Have they any pump pits in the Henderson water works system?
A. Yes, two.
Q. What did they cost, approximately?

Objected to by complainant's att'y.

A. About $17,000.00.
Q. How many engines have they there?
A. There was three at the time I was in.
Q. What did they cost?
A. About $22,000.00, that was up to 1898, when I went out.

255 Q. Now, have any of those engines been replaced?
A. Yes.
Q. What was the cost of replacing, or putting in the new engines?

A. About $14,000.00.
Q. Have they any gate houses?
A. Yes.
Q. What did they cost?
A. $1,600.00.
Q. Have they any standpipes?
A. Two.
Q. What was their cost?
A. About $20,000, I believe.
Q. How much ground does the Henderson water works system own?
A. At that time I believe about 37 acres, belonging to the water works company.
Q. What did that ground cost?
A. I think it cost $7,000.00.
Q. Have they a reservoir?
A. One.
Q. What was its cost?
A. About $19,000.00.
Q. Is there any building or structure of any sort erected down at the river, at the point where the intake pipes are located?
A. There is a kind of embankment, or -butment, to protect the bank, and also the grounds, which cost about $6,000.00.
Q. How many valves are there in the system?
A. About 140 at that time, I think.
Q. What are they worth, or what did they cost?
A. About $4,000.00.
Q. How many hydrants?
A. 90.
Q. What did they cost?
A. $2,250.00.
Q. Can you state approximately the total cost of the Henderson water works system?

Objected to all the foregoing questions in regard to Henderson water works system by the complainant's att'y.

A. About $212,000.00 at the time I went out as superintendent.
Q. State whether or not at the request of the city authorities of Owensboro, you came to Owensboro last spring and spent a day or two here making an examination of the Owensboro Water Works Company's plant?
256 A. Yes.
Q. Did you make an examination?
A. Yes.
Q. Who was with you?
A. Mrs. Charles F. Sturtevant, Mr. Cummings and Mr. Shively.
Q. From the examination you then made of the Owensboro Water Works Company's plant, state what you consider was then the fair value of the Owensboro water works plant and system, all

of its property of every kind and description connected with its business here as a water works plant?

A. I made the estimate at that time of $80,000.00.

Q. From your examination of the Owensboro water works plant and from your own experience as superintendent and operator of the Henderson water plant during 17 years, I would like for you to state what you would consider the fair legitimate expenses of operating the Owensboro water plant for one year?

Objected to by complainant's att'y.

A. I suppose about $5,000 or $6,000. It might amount to a little more.

Q. Taking the two or three years just preceding the time of your resignation as superintendent of the Henderson water works plant, what do you say was the annual cost of operating that plant?

Objected to by complainant's att'y.

A. About $6,000 per annum.

Q. You did not include taxes in that estimate, did you?

A. No.

Q. Or anything for wear and tear?

A. No, not in the estimate of running expenses.

Q. And you did not include in that the cost of any addition to the plant itself?

A. No.

Q. That was just the operating expenses proper?

A. Yes.

Q. What salary did you receive, Mr. Wigal, as superintendent of the works? At the time you went out?

Objected to by complainant's att'y.

A. I received $1,800 a year, and I paid my fireman $40 a month.

Q. About how many miles of pipe are there, approximately, in the Henderson water works system? Say in 1898?

Objected to by complainant's att'y.

A. Something near 19 miles.

257 Q. Mr. Wigal, I will ask you to say whether from your observation and experience there is any fault in the pipe system of the Owensboro water works plant?

A. For fire protection, yes. The pipe are too small for anything like a big fire.

Q. What proportion of the pipe system ought, in your judgment, to be of larger pipe than they have here?

A. I don't know the situation of the city, but the large pipe ought to run parallel with one another about every two streets apart, say of 16 inch pipe, and then connected across with six inch pipe to give fire pressure.

Q. I notice in the Henderson water works system you have 2200 ft.

of 24 inch pipe, and 9000 ft. of 20 inch pipe. What was the object of putting those large pipe in the water works system?

Objected to by complainant's att'y.

A. On account of fire pressure. Our system was not sufficient to maintain our fire pressure with smaller pipe, and we took up the smaller pipe and put the larger pipe down.

Q. You replaced the small pipe in your system down there with this larger pipe?

A. Yes.

Q. When did your service as superintendent terminate at Henderson?

A. December 31, 1897.

Q. When you and Mr. Cummings and Mr. Sturtevant and Mr. Shively made this examination of the Owensboro water plant last spring, did you make a careful examination of the property of the Owensboro Water Works Company here in Owensboro, the pumping station, etc.?

A. Yes, as careful as a person could in the time we used.

Q. Are you satisfied that the valuation you place on their property here is a fair one?

A. Yes, I would think it was.

Q. Mr. Wigal, I will ask you to state from your observation and experience, what it would cost, approximately, per lineal foot to lay water pipe at Owensboro? Estimating the pipe, say, at $30 a ton. I mean for you to include in that the lead, cartage, packing, excavation, refilling, pipe laying and minor incidentals making it complete. Give the approximate figures per lineal foot for laying, say, 4 inch pipe?

A. About 47 cents.

Q. What is it for laying 6 inch pipe?

A. About 65 cents. I would like to take the contract at that anyhow.

258 Q. 8 inch pipe?

A. 95 cents.

Q. State the cost per lineal foot for laying 10 inch pipe?

A. $1.25.

Q. And for 12 inch pipe?

A. $1.55.

Q. And for 16 inch pipe?

A. $2.30.

Q. And for 18 inch pipe?

A. $2.70.

Q. And for 20 inch pipe?

A. $3.20.

Q. And for 24 inch?

A. $4.20.

Q. You remarked just now that you would like to take contracts at those rates. Do you mean that a contractor laying down pipe at

Owensboro or Henderson, Ky., at these prices would make a fair return on his contract?

Objected to by complainant's att'y.

A. Yes. You can make money at those prices.

Q. State whether or not the city of Owensboro and the city of Henderson are situated on sandy benches?

Objected to by complainant's att'y.

A. Yes, so far as Henderson is concerned. I do not know much about Owensboro.

Q. Is it not a fact that there is more hill ground in the city of Henderson than there is in the city of Owensboro?

Objected to by complainant's att'y.

A. I think so from the observation I have made around here.

Q. There is no stone in the ground much at either place, is there?

Objected to by complainant's att'y.

A. I do not think there is. There is a good deal of quicksand at Henderson.

Q. Do you know the price per ton of water and gas pipe at this time?

A. The city of Henderson bought a lot of pipe this fall I think, and paid $26.75 a ton.

Q. What was the price of pipe per ton two or three years ago?

Objected to by complainant's att'y.

A. When I laid this large pipe we bought at $17.50 or $17.75 a ton for 24 inch pipe delivered at Henderson, and maybe $16.75 for the 20 inch f. o. b. Henderson. Iron was low at that time. About as low as it ever gets, I expect.

259 Cross-examined by Mr. CLARENCE FINN, on behalf of complainant, The Owensboro Water Works Company:

Q. How long have you been superintendent of water works systems?

A. About 17 years.

Q. What was your business or occupation prior to that time?

A. I was an engineer.

Q. Did you ever take a course in civil, mechanical or hydraulic engineering?

A. No.

Q. Did you ever have any experience in any of these branches of engineering?

A. Nothing only what I got at the time I was with the water works.

Q. What are the duties of a superintendent of the water works system at Henderson, Ky.?

A. To superintend the works in general, lay down pipes, buy pipe, make contracts, etc., and O. K. bills.

Q. That was the extent of your experience as a civil, hydraulic or mechanical engineer?

A. Well, I have been an engineer before that, working at such as mill business and like that.

Q. Running a common steam engine as engineer?

A. Yes, and setting up engines.

Q. You say you have made an investigation of the Owensboro water works system?

A. Yes.

Q. How many pumps have they in the pumping station?

A. Two.

Q. Of what makes are those two pumps?

A. Well, one is a Buffalo make. I do not know the firm. The other one was partly rebuilt up by some one at Louisville. I don't recollect the name.

Q. Did you ever see those two pumps in operation before or since that time in any other water works system?

A. I don't think that I did.

Q. Similar ones?

A. Yes.

Q. Where?

A. At Evansville, Ind., they have similar pumps. They are on the Holly principal.

Q. You have never seen the exact pattern of those two pumps?

A. No.

Q. Do you know what those two pumps cost?

260 A. Only from hearsay is all I know. The contractor for this Buffalo pump here at Owensboro, was at Henderson at the same time when the contract was awarded here and he made a statement there that he had gotten the Owensboro pump, and he said, I think, that it was $10,000. But that is only a faint recollection.

Q. Do you know which one that was?

A. The big pump, the last one put in.

Q. Who was that engineer?

A. I don't know his name, sir. He was only a salesman sent here to try to sell us one at the same time.

Q. In what year was that?

A. Really I could not state. It was at the time the sale was made here.

Q. Was it 20 years ago, or less than that?

A. Less than 20 years ago.

Q. Five years ago?

A. More than five years ago.

Q. Do you know when that pump was put in?

A. No, I could not state. If I was at Henderson where I could get the papers, I could give the particulars about the date it was sold.

Q. As to the cost of that pump, you have only a faint recollection as to what the salesman said it was?

A. Yes.

Q. You do not know what those pumps brought on the market at that time, or since that time?

A. No.

Q. Did you ever try to find out what they cost?

A. I do not think I ever did on the Buffalo pump.

Q. How do those pumps take water? What structures are beneath them?

A. They are constructed with a suction and a force lift, by plungers.

Q. How do they take water?

A. Through suction valves.

Q. Directly from the river, or not?

A. Direct from the river, so far as I know.

Q. There are no wells underneath them?

A. The pumps are put into a pit, but the main pipe runs out into the river, so far as I know, from what the engineer there told me. They take water about four feet from the bottom of the river.

Q. Did you make an examination of anything beneath the floor or surface of the engine house up there at all?

A. Yes, I was down under there.

Q. What did you see underneath there?

261 A. The pumps and iron casing that framed the walls of the wells or pits where the pump was constructed in.

Q. How many?

A. 2 pumps.

Q. Two pits?

A. The big pump is constructed in a pit of its own.

Q. Is the little pump constructed in a pit of its own?

A. Really, I don't recollect now.

Q. How much did these pumps cost constructed?

A. I do not know in detail what they would cost.

Q. Have you any idea what they would cost?

A. I suppose $12,000.00.

Q. Apiece?

A. No, not each, unless they had very bad luck in getting them down.

Q. Could not they have cost more than that?

A. Yes, more or less.

Q. What are they constructed of?

A. The one that the big pump is in is constructed of iron similar to boiler iron.

Q. The little one, what is it constructed of?

A. I really don't recollect what it was constructed of, because I was down more in the big one than in the little one.

—. ——.

A. I just went in where the pumps were connected down there.

Q. What are the dimensions of those two wells?

A. I could not state.

Q. You said something about putting in a pumping engine at

Henderson, Ky., not long ago, what was the capacity of that engine?

A. 3000000 gallons per 24 hours.

Q. How much did it cost to put it in?

A. $14,000.00.

Q. What is the capacity of these two engines?

A. One two and the other three million gallons per day, I think I made it.

Q. If in fact one of them has a capacity of four million gallons per day, what would a pump similar to that cost at the present time?

A. I could not tell you. However, I would consider it all out of proportion to this water works.

Q. In what way?

A. Too much capacity for the size of the pipe system, and the amount of water that would be used here in the city.

Q. You mean being able to pump more water than the city can use?

262 A. Yes, and that being the case, you could not run the pump without it stopping on dead centers, because it would have to run slow, you could not do good work.

Q. Did you ever see it in operation?

A. Yes.

Q. When?

A. Some five or six years ago. I don't recollect when it was.

Q. Does the mere fact that an engine has more capacity than is necessary make the system deficient in any way?

A. Yes, in the pump business, because you really could not operate the pump well, because it is liable to break crank pins in passing a center so slowing, and it would not do its work right.

Q. If a pump does not work at all, then it has nothing to do with the efficiency of distributing water, does it?

A. In running slowly it is liable to stop on center, or you might let part of your water run back into the river, or use a roundabout.

Q. Did you ever see the pump stop when in operation?

A. No.

Q. Do you know whether it ever does stop?

A. Only what the engineer told me.

Q. Do you know how much water the city of Owensboro uses?

A. No.

Q. Have you any idea?

A. I don't suppose it uses over a million a day.

Q. That is a mere guess?

A. Yes. I only guess that from the use of water at Henderson, and I don't believe they use as much here as we do at Henderson.

Q. You say, I believe, that you do not know what it would cost to put those engines back in the water works company's plant?

A. I don't know at the present time.

Q. You don't know the dimensions, and how much it would cost to construct those wells?

A. I suppose it would cost $12,000, more or less.

Q. That's a mere guess, it might cost more or less?

A. Yes, it is only from other constructions of a similar character that I make my estimate.

Q. What other similar work did you ever construct?

A. I superintended some stone work that cost a good deal more than this, I think.

Q. Do you know whether it cost more or less?

A. No.

263 Q. Did you ever see, or superintend the construction of two wells, or any number of wells, as these two are here in the city of Owensboro?

A. No.

Q. Have you any idea from personal knowledge what either one of those two wells cost?

A. Only from observation, taking what I did at Henderson into consideration.

Q. Did you ever do anything of that kind at Henderson?

A. No. Ours was stone work.

Q. Would your observation or work at Henderson give you an opportunity to judge of the cost of these wells?

A. I would not have any observation from the same as this is unless it would be in the construction of stand-pipes. It is similar work, only it is above the ground.

Q. Could you estimate the value of making an excavation in the ground in quick sand and placing these pits or wells underneath the ground, from what it would cost to erect a standpipe on stilts above the ground?

A. No.

Q. Now, you state that you have never constructed, nor seen constructed, similar wells to those in the city of Owensboro, and have no idea of what they cost?

A. No, I don't. I never constructed any.

Q. You say you have never seen in operation, and have no idea what it would cost to place two of the same pumps back in any water system as those operated in the city of Owensboro at the present date?

A. I don't know whether you could find such another set in the United States as they are, as for that.

Q. Then how, and upon what basis, do you estimate the fair cash value of the pumping station in the city of Owensboro owned by the Owensboro Water Works Company?

A. I don't know that I could give you any definite answer to that.

Q. Has Owensboro a standpipe or reservoir?

A. No.

Q. It has a direct pumping system, has it not?

A. Yes.

Q. In using a direct pumping system, is it necessary to use pipe

of the same size as those used in a water system which has a standpipe or reservoir, or gravity?

A. Yes, I think it is as necessary if you aim to cut off friction. A large pipe takes off the friction.

Q. Is that the only benefit—the lack of friction from having a large pipe?

A. Yes, that's the benefit. Avoiding friction is one of the great benefits in a water works system.

264 Q. How much less friction to the square inch or square foot is there in a six inch pipe and twelve inch pipe?

A. A twelve inch pipe has four times the capacity of a six inch pipe, and if you want to use the same amount of water through a six inch pipe that would go through a twelve inch pipe, you would have to raise your pressure very materially.

Q. I say, what is the difference between the friction to the foot in a six inch and twelve inch pipe?

A. I hardly know how to get at that. Suppose we had a ten foot head, and it was on an inch pipe one foot in length, I would get ten gallons a minute; then if I run the pipe horizontally 100 ft. I would get 2 gallons a minute from the end of that 100 foot pipe.

Q. Is that the very theory of the direct pumping system, the fact that they pump directly into the mains, as against the friction which is caused in a gravity pressure system?

A. I don't understand that. If you put a certain amount of water through a pipe either by gravity or by pumping, the friction would be the same.

Q. Have you ever operated, or had anything to do with operating a direct pressure water works system?

A. Very little, however, at Henderson, we could change our pressure to either standpipe or direct pressure. But we always use the standpipe pressure in case of a fire.

Q. Never use direct pressure?

A. No.

Q. If you want to get the greatest pressure through your mains, do you use direct pressure or standpipe pressure?

A. I said we never did use the direct pressure, because we found the standpipe pressure sufficient.

Q. You could have got a greater pressure by the direct pressure than by the standpipe system?

A. You could run up to anything the pipe would stand by direct pressure.

Q. Then it is necessary, where you use the standpipe or gravity system, to use larger mains than you have to use when you have direct pressure, is it not?

A. No, with the same amount of water it is not. Suppose we were working with eighty of the one and eighty pounds of the other, it would be equal.

Q. Could you not, by an increased pressure, get as much water out of a six inch pipe as you could with less pressure from a gravity system out of a larger pipe?

A. You can get a greater quantity of water by increasing your pressure.

265 Q. How much time did you spend in examining the water works plant in the city of Owensboro, the entire plant?

A. I don't remember. I was up here a couple of days.

Q. Did you use those two days in making an estimate of the fair cash value of the Owensboro water works system?

A. Part of the time was used in examining about the lineal feet, valves, hydrants, and one thing and another of that kind.

Q. As to the expenses of operating the Henderson water works plant, that plant, I believe, only runs eight hours a day, does it not, as a general rule?

A. It runs more than that.

Q. How many hours a day does it run? As a general rule?

A. During the time I was in, we generally run all day, and sometimes part of the night in the season of the year when we were using the greatest quantity of water, and when not using so much we generally run during the day—would start up at seven in the morning and run to four or six o'clock, or any time so that we had enough water in the reservoir.

Q. On an average, the year round, I will ask you if it does not require your plant to be operated only from 8 to 12 hours a day to furnish sufficient water for the city of Henderson?

A. It would not exceed, I don't suppose, twelve hours.

Q. You use how many employés?

A. There is four regular employés that run the water works system continually, that are on a salary.

Q. If it requires four men to run your plant on an average of twelve hours a day, would it not require an extra set of men to run your plant during the night time, if you had to run as here, day and night?

A. Yes.

Q. You say the expense of running the Henderson water works plant on an average of 12 hours daily has been about $6,000 per annum?

A. Yes.

Q. Were you required to run your plant 24 hours a day, and have two sets of men, would not the expenses be almost twice as much as they are now?

A. I suppose they would.

Q. That would make the total expense of operating your plant something like $12,000 yearly?

A. I suppose it would.

266 Q. How much time did you spend in finding the operating expenses of the Owensboro water works, or did you make your estimate of the running expenses of the Owensboro water works upon your knowledge of the expenses of running the Henderson water works?

A. I suppose I made it upon the knowledge I had of the Henderson water works.

Q. You only allowed then in your estimate for the Owensboro Water Works Company's expenses for running the same length of time that the Henderson Water Works Company run, during the day, namely, 12 hours?

A. Yes, I made it on that basis.

Q. Did you ever lay any pipe in the city of Owensboro?

A. No.

Q. Know anything about what it would cost to lay pipe in the city of Owensboro from actual experience?

A. No.

Q. You have given a rate for laying pipe per lineal foot from some table that you have. Was that table prepared by yourself?

A. No.

Q. Do you know who it was prepared by?

A. It was taken from thirty different cities and estimated from that. It is headed as follows: "Table showing the average cost of laying water pipes from the experience in the construction of 30 water works. By Wm. B. Rider, civil engineer, late of the Connecticut State board of engineers, members of the American Water Works Association, etc., South Norwalk, Conn."

Q. This table is a printed table that is sent out?

A. It is sent out to persons who pay for it.

Q. Do you know anything of the correctness of it from actual experience?

A. I think I do.

Q. Did you ever lay pipe in any of the cities mentioned here?

A. No.

Q. How do you know from actual experience?

A. From laying some 14 or fifteen miles of pipe in the city of Henderson.

Q. I will get you to state whether or not this table is based upon straight miles of pipe, or do you know?

A. It is based upon laying lineal feet of pipe. Of course feet make miles.

Q. I will get you to state whether or not this table is based upon laying so many straight feet of pipe?

A. Yes, I suppose so.

Q. Do you know whether it is or not?

267 A. That's lineal feet. It does not include valves and all that kind of work.

Q. What does it include?

A. It includes laying straight pipe.

Q. Does not include any special castings?

A. I would take the contract to furnish in the special castings, etc., at the same rate.

Q. Did you ever have a contract to lay pipe in your life?

A. Yes. I laid about 9000 feet of gas pipe this fall.

Q. Did you ever have a contract with any city, private corporation or individual to lay water works mains?

A. No, I couldn't take a contract when I was superintendent of the water works.

Q. You did not have any other kind than private contracts when you were superintendent of the water works?

A. No, it required my whole time, as superintendent.

Q. Did you ever in your life lay a pipe system for any water works company in any city in the world?

A. No.

Q. Do you know anything about how they ought to be laid?

A. Yes, I think so.

Q. Is there any mathematical rule by which you can calculate the proportion, or the number of feet of any certain size pipe, in any water works system?

A. There are mathematical rules, but I am not posted on any of them?

Q. Where did you ever see them?

A. In water works treatises and works I have read. For instance, such as where the object was to get a certain amount of water out of a certain size pipe over a certain distance without undue friction.

Q. If Mr. Sturtevant, who was examined for the city in this case, said that there was no such rule of mathematics, then he was mistaken was he not?

A. No, I wouldn't say that.

Q. You say there is such rule?

A. Where you want to get a certain quantity of water over a certain distance as I said before, there is a rule to work it by. The pipe must be in proportion.

Q. You have stated in your direct examination that the water system in Owensboro should consist of so many feet of 16 inch pipe, and so many feet of 18 inch pipe?

A. Did I state so many feet, or just parallel with one another, connected by smaller pipe for fire pressure?

Q. Then you stated that the 16 inch pipe should be laid parallel and connected by six inch pipe?

268 A. Yes.

Q. In order to furnish sufficient fire protection?

A. Yes.

Q. Is that independent of the amount of water to be furnished?

A. In fire protection you wouldn't know how much water you would necessarily need. There is a difference in fires, you know.

Q. As a matter of fact have you ever seen the Owensboro water works system tested in a fire?

A. No.

Q. Do you know whether it affords sufficient fire protection or not?

A. No.

Re-examined by Mr. GEO. W. JOLLY, att'y for the City of Owensboro:

Q. You say that in the Henderson system you have two standpipes and a reservoir?

A. Yes.

Q. And it was your habit, while you were employed there to run the engines and pumps long enough to get a sufficient storage of water to last during the day, and that it usually took a half a day or more to fill the standpipes and reservoir?

A. Yes.

Q. And that under the Holly system here where they have no standpipe and reservoir, it is necessary to run all the time?

A. Yes.

Q. Now, tell me what additional hand hire would be necessary to operate the plant from six to twelve hours more than you operate at Henderson; that is, instead of operating it half a day, you would, as here, operate it during the whole day. What additional cost would there be connected with that where you have a regular set of hands for the twelve hours, then you increase the operating time to twenty-four hours?

A. It would require but one additional hand the way they work it at Henderson, because the watchman serves as fireman during the night run.

Q. Now, you would have to have an assistant engineer in addition?

A. Yes.

Q. You would have to have a fireman in addition?

A. No.

Q. But suppose you did have to have a fireman?

A. Yes.

269 Q. And the additional cost of coal for twenty-four hours instead of twelve?

A. Yes.

Q. Do you mean to say that the additional cost of coal, one fireman and an assistant engineer would amount to any such sum of money as they had you state here a while ago; in other words, would the additional cost of operating the plant during the 24 hours not be more than $1,000 a year?

A. It would not at Henderson.

Q. Then that answer you gave a while ago would be a mistake entirely? If it cost $6,000 to operate the plant 12 to 14 hours a day, the additional 12 or 10 hours would not cost over $1,000 per annum, would it?

A. I believe it would cost over that.

Q. How much more?

A. The fireman would cost probably $50 a month, and the assistant engineer $60 or $70 a month, and the coal would probably bring it up to $2,000.

Q. It is shown by the evidence of Mr. McGonigal, the auditor of the complainant company that the coal bill for the last two years

has been approximately $900 per annum for the Owensboro plant. Now, then, assuming that to be the cost, the additional cost would simply be the engineer and fireman. Is that correct?

A. Yes.

Q. You were asked on cross-examination here about the proportion of large and small pipe that ought to exist in a water works system such as we have at Owensboro and Henderson, take these two plants at Owensboro and Henderson, I will ask you to state whether from your actual observation and experience of 17 years, what amount of pipe from 16 to 24 inch there ought to be in such a system as you have at Henderson, and such a system as we have here at Owensboro in order to afford ample fire protection?

A. I don't know hardly how to answer that question. We have about the right proportion—or rather we have hardly enough big pipe in the lower part of the town at Henderson, but it is ample in the upper part of the town.

Q. In the Henderson water works system you say there are 2200 ft. of 24 inch pipe?

Objected to by att'y for complainant.

A. Yes.

Q. There are no pipe in the Owensboro water works system of that size?

A. No.

Q. There are 9050 feet of 20 inch pipe in the Henderson
270 water works system, and there are no pipe of that size in the Owensboro system?

A. No, I think 16 inch is the largest you have here in Owensboro.

Q. They have only 600 ft. of 16 inch pipe in the Owensboro system, which is at the intake?

A. I was under a different impression. I thought that a 16 inch pipe ran from the station up to the first cross street there. That must be a mistake.

Q. In the Henderson system you have 17400 feet of 12 inch pipe, whereas in the Owensboro system we have only 5600 feet of 12 inch pipe?

A. Yes.

Q. You say there is not enough large pipe in the Henderson system to afford adequate fire protection?

Objected to by att'y for complainant.

A. No, not in the lower part of town.

Q. Have you or not, seen and examined the new pump that was recently put in at the Henderson water works that you have spoken of heretofore?

A. Yes.

Q. What is the capacity of that pump?

A. 3,000,000 a day—gallons.

Q. State whether or not that is a superior pump to either one of the pumps they have at the Owensboro water works station?

Objected to by attorney for complainant.

A. Yes, sir; a great deal better.
Q. What did that new pump at Henderson cost?

Objected to by attorney for complainant.

A. It cost about $14,000.00 in place.
Q. Where was that pump built?
A. At Milwaukee, by Allison & Co.
Q. I will ask you another question; when was that new pump placed in the station at Henderson?

Objected to by attorney for complainant.

A. Last year, 1899.
Q. I will ask you whether or not at that time, price of pumps, and all sort of iron goods were not very much higher than they had been for several years before, and higher really than they are this time?

Objected to by attorney for complainant.

A. Really I don't know what they are this time. They were a little higher then than they had been before. I do not know what such a pump as that could have been bought for a few years before.

Q. I will ask you from your actual examination of these
271 pumps up here, and this new pump at Henderson, if that pump in there at Henderson about a year ago, which you say cost $14,000 in place, is not as good as both of these pumps here combined?

Objected to by attorney for complainant.

A. Yes, I would not give it for three like you have here, as far as that is concerned. It is a first class pump.

"Signature waived."

Also the deposition of Mr. Robert A. Cummings, taken at the law office of Mr. George W. Jolly, at the same time, and for the same purpose.

Examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro.

The witness being first duly sworn, deposed as follows:

Q. State your age, residence and your profession, or occupation?
A. 34 years; residence, Owensboro, Ky.; civil engineer and contractor.

Q. Where were you educated as a civil engineer?

A. London, England.

Q. Have you been in the practice of your profession for some years?

A. Since 1883.

Q. Are you a member of any society?

A. I am a full member of the American Society of Civil Engineers?

Q. Have you ever had any experience in hydraulic work?

A. Yes.

Q. When and where?

A. Prior — 1887 in the city of Philadelphia, public works department, and at various times between that and until 1890, when I was engaged in Virginia in various local hydraulic works, and I might have said West Virginia also; from 1893 to 1898 I was engaged as consulting engineer in Philadelphia, occupied there largely in hydraulic work particularly; also in Camden, N. J., in the water works at that place.

Q. Have you ever designed any water works systems?

A. Yes; when I speak of hydraulic work I mean the designing as an engineer necessarily. As contractor I have executed no water works contracts.

272 Q. State whether or not you were requested by the officers of the city of Owensboro to examine and report upon the value and condition of the system of water works owned and operated by the Owensboro Water Works Company, if so, when, and how long were you occupied in making that examination?

A. I was requested by the city officers here to make such an examination and valuation of the system. I was engaged at the work three or four days in last April, 1900.

Q. I would be obliged to you if you would state in detail what property they have here, that is, their pipe system, and the number of feet of the different sizes, hydrants, and water mains, and their engines, and pumping apparatus and station, and give a full statement of the kind and quantity of property they have embraced in their system, and state as nearly as you can the original cost of it, then state the present value of it, and then state what, in your judgment, it would cost to duplicate this system at this time?

A. System of water main pipes, hydrants, water gates, meters and taps, 400 lineal feet of 16 inch pipe, diameter of cast iron suction pipe, complete, $8.00 per lineal foot, total for 16 inch pipe..... $3200 00

600 ft. or 24 inch cast iron water pipe, complete, $10 per lineal foot..... 6000 00

5600 ft. or 12 inch pipe..... 7840 00

300 ft. of 10 inch pipe..... 345 00

10750 ft. of 8 inch pipe..... 9137 50

60100 ft. of 6 inch pipe..... 39065 00

28075 ft. of 4 inch pipe..... 12635 75

1500 ft. of 3 and 2 inch pipe	300 00
60000 lbs., approximately, of special castings	1500 00
One 20 inch water gate and box complete	100 00
2 16 inch water gates and box complete	60 00
Total	$120 00
5 12 inch water gates and boxes, complete, $35 each	$175 00
2 10 inch water gates and boxes, complete, $25.00 each	50 00
18 8 inch water gates and boxes, complete, $20 each	360 00
89 6 inch water gates and boxes, complete, $15 each	1335 00
60 4 inch watergates and boxes, complete, $9 each	540 00
273 3 3 inch water gates and boxes, complete, $5 each	15 00
161 2½ inch double discharge fire hydrants, at $25 each	4025 00
64 water meters in place at $10 each	840 00
1200 water taps from water mains, at $5 each	6000 00
Making a grand total of	$94,381 25
Pumping house and appurtenances complete, consisting of pumping house and apparatus	$5325 00
Smoke stock	1675 00
Total	$7000 00

Pump machinery.

Pumping engines Nos. 1 and 2, surface condensers, air pumps, pumping wells, tunnels, etc., complete	$14400 00
3 horizontal tubular boilers, 60 inches in diameter, by 16 ft. long, half cast iron fronts, and brick settings, complete, with appurtenances	2700 00
Real estate at pumping station	1500 00
Making a second grand total of	$119981 25

Q. Is that your estimate of the original cost of the property?

Objected to by attorney for complainant.

A. Yes.

Q. I will ask you to state next the present value of the property above mentioned?

A. $87,250.00.

Q. Please state what at the present prices, the foregoing property that you have mentioned could be duplicated for at Owensboro, the pipe put down in the ground, and the plant ready for business?

A. Approximately $124,500.00.

Q. Can you say as to the present prices of this material with reference to prices heretofore, whether it is greater or less?

A. Prices now are higher.

Q. About what per cent. would you say?

A. 75 per cent. higher.

Q. I will ask you to give an estimate of what you consider the fair and legitimate operating expenses of the Owensboro
274 water works plant ought to be per annum, including in your estimate the salary and wages of the superintendent, officers, clerical force, stationery, coal, oil, waste, and all the expenses of operating the plant on a fair and economical basis for one year?

A. $5,600.00.

Q. What do you consider to be a fair estimate of the annual depreciation of the present water works system? At this time?

A. Four per cent. along the Ohio river.

Q. What is the present condition of the buildings of the Owensboro water works plant?

A. The buildings are in need of considerable repairs, hence much depreciated in value. The brick smoke stack is necessarily large, and expensively constructed, and is very much in need of repairs.

Q. State whether or not in your opinion, after an examination of the pipe system of the Owensboro Water Works Company, it is so constructed as to afford adequate fire protection to the city of Owensboro?

A. I would say it is inadequate.

Q. Mr. Cummings, are you able to say what it ought to cost to pump one thousand gallons of water? You put it here at 1½ cents in your affidavit per thousand gallons?

A. That is what I would say now. It ought to be pumped at that.

Cross-examined by Mr. CLARENCE FINN, attorney for complainant:

Q. I believe you estimated the pipe system of the Owensboro Water Works Company to cost approximately $94,000.00?

A. $97,000.00.

Q. You say the materials are now 75 per cent. higher than when that pipe system was made?

A. I don't know when it was laid, and what the cost was then, of course, not knowing when it was laid.

Q. What do you base your estimate on?

A. I say the advance is about 75 per cent., not necessarily on pipe, since 1893.

Q. Do you know anything about what the price of pipe was per ton when this pipe system was laid?

A. I don't know when this pipe system was laid.

Q. As to the cost and price of the pumping house and machinery, what sort of pumps have they, how many?

A. They have two pumping engines.

Q. Of what make?

275 A. I don't recollect the make of the engine.

Q. Do you know the market price of the two engines that they have up there—the identical pumps?

A. I do not.

Q. Did you ever by any method or means try to ascertain the cost price of those identical pumps that the water company now uses?

A. I arrived at my conclusion as to the value of the pumping engines from a comparison with what a first-class pumping engine should cost, and not those identical pumps.

Q. Your business has been that of making plans and specifications under which water works systems were constructed, rather than constructing the systems yourself?

A. That necessarily involves the construction of water works where required.

Q. Have you actually constructed water works systems?

A. Yes.

Q. How many and at what places?

A. Camden, N. J., for instance, and Philadelphia, Pa.; New Field, West Virginia; Columbus, O.; Roanoke, Virginia.

Q. Were you the contractor that constructed those systems, or were you merely an engineer?

A. Merely a civil engineer.

Q. Is not there some difference between the knowledge of the engineer who constructs the plans and specifications under which the water works systems are to be built, and the knowledge as to the labor necessary? Might not a man be thoroughly competent as a civil engineer to draw plans and specifications under which a system was to be built, and wholly ignorant as to the amount of labor necessary in a different locality to construct that water works system?

A. There is a possibility of such a man existing, but not to my knowledge.

Q. I believe you called the man who actually builds the water works plant the "contractor"?

A. Constructing engineer or contractor.

Q. Have you been engaged in that business?

A. Yes. But not doing it individually, but purely for my clients or superiors, or other people.

Q. Your business then has been to draw up plans and specifications under which systems were built, and not as a contractor who executed the plans and specifications?

A. No.

276 Q. Have you ever had charge or superintendence of a water works system?

A. No.

Q. You have no knowledge except from estimates, as to the cost of running a water works system?

A. I would not obtain my knowledge from estimates. My knowledge on that subject is obtained from investigation into the subject.

Q. What system does the Owensboro Water Works Company have?

A. Direct pumping system.

Q. Holly system?

A. You can call it that if you please, or direct pressure.

Q. How do they get their water from the Ohio river?

A. By pumping directly.

Q. Directly from the river, or from wells constructed underneath the floor of the station?

A. It enters through a suction pipe from the river to the wells, and is pumped from the river into these wells, and then directly into the mains.

Q. Did you go down underneath the floor to examine the wells and the material of which they are built?

A. I examined the wells. I could not go far beneath the floor, but I went sufficiently far to see and examine the construction.

Q. Of what are those wells constructed?

A. That's a matter about which I would have to refer to my notes. I am not certain, but I think they are constructed with an iron lining.

Q. Do you know the thickness of those iron linings?

A. I cannot recollect it.

Q. Did you go far enough into the wells to find out exactly how the water is pumped into the mains?

A. As I just indicated, the wells were opened for us by the officers of the water company, and I made an examination of the interior of the wells as far as daylight enabled me to do so, but I did not go to the bottom of the wells.

Q. From your examination of those wells and tunnels, could you tell the cost of construction of them?

A. Approximately.

Q. How much did it cost to construct each of those two wells and tunnels?

A. I cannot divide my estimate in an off-hand sort of way. I would have to make an examination of the strata there and other small details to determine the exact cost of anything.

277 Q. Can you approximate how much it cost per cubic yard to sink those wells?

A. I suppose those wells could be sunk for $5 a foot in depth. That is off hand judgment without an investigation.

Q. Of what dimensions are those two wells?

A. I do not recollect their dimensions exactly, I have not my notes with me; but the notes taken at the time served to form the estimate I have already made.

Q. To construct the two wells and the intake pipes, and the two engines, one of the capacity of 4000000 gallons and the other of 2000000 gallons, would it not cost more than the sum of $14,400?

A. That depends upon the skill with which the work is done. I would like to say that I have known of work of that kind being

done very successfully and economically, and I have known of similar work, similarly situated that has been exceptionally expensive.

Q. You do not know with what success these wells were sunk, and the actual cost?

A. I assume that they were sunk successfully without any extra cost.

Q. As a matter of fact, do you know whether or not the large pump with a capacity of 4000000 gallons cost within the neighborhood of $30,000 to place?

A. I am not informed on that point.

Q. Do you know whether or not it is a fact that the placing of the small pump in the water works system cost approximately $20,000.00?

A. I am not — all aware of that. We asked for that information. It was not given us. We asked explicitly for that.

Q. Who did you ask for it?

A. Mr. Williams.

Q. Is he not the engineer of the Owensboro Water Works Company?

A. Yes, and I believe I asked Mr. Martin, the superintendent of the company.

Q. Did you apply to the president, or secretary and treasurer of the company?

A. I do not know who they are, sir. I only applied to the parties resident here.

Q. Then you do not know whether they had that information in their knowledge, or could give it to you?

A. I do not.

Q. As to the fire protection furnished by the Owensboro Water Works Company, you say you have never seen a practical test of it?

278 A. No.

Q. Might it not be possible for a six inch pipe to afford ample fire protection for any business street in Owensboro with sufficient pressure? Constructed as they are?

A. If as constructed at present, no. I might modify the statement, or correct the statement, that I have never seen a fire in Owensboro. I saw the disastrous fire at the Marsden Cellulose plant where the plug failed in that fire. I do not know what size main that was on, however, but it was right near the water works. That fire was about six months ago.

Q. How many plugs did you say failed?

A. One plug to my knowledge.

Q. That was the only one?

A. I saw an inadequate supply from the plug on the corner of Main and Boliver or Clay, the corner where the fire was.

Q. Do you know the reason, or cause of that failure?

A. I did not investigate it.

Q. You do not know whether it was due to insufficient pressure, do you?

A. I saw the plug myself, and saw the inadequate supply myself.

Q. Do you know of your personal knowledge the reason of the seeming inadequacy of the water supply at the plug you speak of?

A. I did not investigate it.

Q. Might it not be due to the fault of the firemen in failing to open the plug to its fullest capacity?

A. Of course, there is such a possibility.

Q. Would not that have the same effect upon the supply of water that you saw?

A. It would diminish the supply. There is no question about that.

Q. You say you have never had any practical experience in operating a water works system?

A. No.

Q. How did you arrive at your estimate of the running expenses of the plant at Owensboro?

A. Determining the salaries, the wages of the superintendent, officers, clerical force, making liberal allowances for stationery, etc., and my individual knowledge of what the cost of coal was, the cost of oil, waste likely to occur in such circumstances, and all added together formed the approximate cost.

Q. Are you familiar with the wages necessary to be paid to competent men to run the water works system at Owensboro?

279 A. Not familiar with their individual wages. I know what such men are worth. I know what I could duplicate them for if I desired to do such work myself.

Q. And it is upon that knowledge that you base your estimate?

A. Precisely.

Q. And not upon any actual knowledge of the situation here?

A. That was unavailable to us.

Q. Now, as to estimating the pipe system, what price did you allow per ton for the pipe?

A. $30 per ton is my recollection, using standard water pipe.

Q. At the time you made the examination, at the instance and request of the city of Owensboro, of the Owensboro water works plant, were you or not a contractor for the city of Owensboro, putting down the sewerage system for the city?

A. I was not engaged as a contractor for the city of Owensboro at that time.

Q. When did you become a contractor, in the employ of the city placing sewer pipes for the city?

A. I think the 14th day of May, 1900.

Re-examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro:

Q. Have you been engaged in actually constructing water works plants; if so, where?

A. Yes, I have already stated that I was actually engaged in actually constructing water plants in Philadelphia, Pa., and elsewhere.

"Signature waived."

Also the deposition of Mr. C. W. Bransford, taken on the 17th day of December, 1900, at the same place, and for the same purpose.

Examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro:

The witness, being first duly sworn, deposed as follows:

Q. State your age, residence and the business you are engaged in?

A. I am 42 years old; reside in Owensboro, Ky.; I am engaged in the merchant milling business.

280 Q. How long have you resided in the city of Owensboro?

A. All my life.

Q. How long have you been engaged in the merchant milling business in the city of Owensboro?

A. About 13 years.

Q. Have you during the time you have been engaged in the merchant milling business used water supplied by the complainant, The Owensboro Water Works Company, for milling purposes?

A. I have used water supplied by the Owensboro Water Company, and I think by the Owensboro Water Works Company as well. I do not know when the change was made in the name of the corporation.

Q. Have the rates for water ever been changed by the company?

A. Yes, they were changed while I was using the water.

Q. In what year was the change made?

A. I think in 1896.

Q. Do you know how much water you had been using up to the year 1896, the quantity?

A. No, I only know what I was paying for the use of the water.

Q. How often did you pay for it?

A. Monthly.

Q. What was the monthly charge made for water up to 1896?

A. It ranged from $5 to $28 a month, approximately.

Q. About what did the water cost you annually up to that year?

A. About $150.

Q. You speak about the rates having been increased in 1896, did you take water under the new rates in 1896–7, under these increased rates, I mean?

A. I do not think I did.

Q. What would it have cost you to have taken the same quantity of water you had been receiving before at $150 a year, under these new rates?

A. I made an estimate at the time, and according to my estimate, it would have cost me between $500 and $600 a year.

Q. What did you do for water, how did you procure water? After that did you take it from the water company or elsewhere?

A. I sunk a drive well.

Q. What is the capacity of your flour mill?

A. About 250 barrels of flour per day of twenty-four hours' run.

281 Q. Can you afford to pay the rates charged since 1896 for water, or can anybody in Owensboro, engaged in the same business you are engaged in, as a manufacturer of flour, in the same quantities, afford to pay the rates that are charged at present by the Owensboro Water Works Company?

Objected — by attorney for complainant on the ground of irrelevancy, and that it matters not what is the private financial capacity of the witness, or of other parties *are*.

A. I can not afford it.

Q. Why?

A. Because the cost of water is too much per barrel of flour. The profit on flour is too narrow to justify such an expense.

Q. State whether or not the rates now charged for water furnished to merchant millers in Owensboro is prohibitory or not?

Objected to by attorney for complainant on the ground that it is irrelevant, and that it is a conclusion.

A. It is so far as I am concerned.

Q. State whether or not it is so as to other millers in this city? That is of the same capacity, or about the same capacity, as your establishment, in your opinion?

Objected to on the ground that antecedent evidence does not establish the capacity of an expert in the witness.

A. My opinion is that it would be.

Q. How long do you say you have been engaged in the merchant milling business in the city of Owensboro?

A. About 13 years.

Q. Where is your mill located?

A. On Fourth street, between Triplett and Center streets in the city of Owensboro.

Q. What has been the approximate daily average of your mill, I mean the number of barrels of flour produced daily at your mill since 1896?

A. That's a question I couldn't very well answer. It varies at different seasons of the year. We make more flour at this time than we do in the summer. I suppose through that it would average 150 barrels of flour a day while we are running.

Q. What would you say was the approximate average in the year 1896?

A. It was not that much then, because I did not make as much flour then as I do now. It was probably 100 barrels a day.

Q. What was it in 1895?

A. Still less. There was some increase in 1896.

Q. Who superintends the operation of your establishment?

282 A. J. A. McCallister.

Q. Do you not yourself have a general supervision and control of the business?

A. I do, but I have nothing to do with the mechanical part of the work. I supposed you referred to that.

Q. I am speaking about the operation of your milling business?

A. I have entire supervision of the business.

Q. How long have you had this entire supervision of your business?

A. Since I bought out my partner in 1893.

Cross-examined by Mr. W. W. DAVIES, attorney for complainant:

Q. Do you remember the exact date when you ceased to use the water of the Owensboro Water Company?

A. I have never entirely ceased to use it. I still use it for flushing my boilers.

Q. I mean using it generally? As you did at one time?

A. No, I don't remember definitely, but I think it was some time in 1896, the spring of 1896. I could tell exactly by referring to my books and receipts. I know I took the water for general uses in 1896 from the Owensboro Water Works Company, as late as April.

Q. You say the rate for water was increased in 1896?

A. That is my impression.

Q. Are you a citizen of Owensboro?

A. Yes.

Q. How long have you been a citizen here?

A. All my life. I was born and raised here.

Q. Have you been familiar with the affairs of the city ordinarily as a citizen would be?

A. Yes.

Q. Is it or not true in 1896, or about that time, the city increased the taxes on the present water works company?

A. Yes, I think the company gave as an excuse for raising the rates that the taxes had been increased.

Q. How do you take your water, by meter, or otherwise?

A. By meter.

Q. How much per thousand gallons did you pay?

A. 15 cents per thousand gallons under the old rates.

Q. What did the new rates make it?

A. 35 cents for the first ten thousand; that is, 35 cents a thousand, then they had a graduated scale for increased quantities running down. The rate got less as the quantity used increased.

283 Q. Well, how low did the rate run?

A. I think as low as 10 cents per thousand gallons.

Q. Do you remember what the rate was for the second ten thousand gallons?

A. Think it was 30 cents.

Q. For the third ten thousand?

A. I don't remember as to that now. I could tell by referring to my receipts.

Q. Was it, if you remember, 25 cents for the third ten thousand gallons?

A. I can't say, but my impression is that it was. I think it was reduced five cents per thousand as the quantity used increased.

Q. How much water did you use at that time when you manufactured 100 barrels of flour a day?

A. I don't know as to the quantity I used. I never took any account of the quantity. I paid the bills.

Q. You said a while ago, I believe, that you paid about $150 a year, did you not?

A. Yes.

Q. At 15 cents a thousand gallons?

A. Yes.

Q. That would be 1,000,000 gallons, would it not?

A. Yes. You understand that at that time we did not run the mill like we do now. We commenced running it in 1896 at a very increased capacity.

Q. How much water do you use now?

A. I haven't the least idea. We only use from the water company the minimum amount per month.

Q. Do you pump your own water now?

A. Yes, I have a steam pump and a drive well.

Q. Have you ever applied to the present company for a manufacturer's rate?

A. Not in the sense of making application. I have said to Mr. Asa Williams, the representative of the water company, that if I could get water at about what boiler compound and the additional cost of cleaning my boilers amounted to, that I would go back using the water of the company. You see this water we get from the well is hard water, and it requires the use of a compound to soften it to prevent scaling the boilers, and it requires the boilers to be cleaned every other Sunday, and the pipes and pumps every other Sunday. It adds materially to the cost of operating the plant, enough very nearly to pay the same amount of water rent I was paying before the increase in rates.

Q. Are there any manufacturing concerns in Owensboro, or near it, that use the water from the present water company?

284 A. None that I know of, except the ice factory. I believe they do.

Q. Do you know of any other company?

A. None for general purposes; all of them to some extent.

Q. Do you know exactly to what extent these manufacturing companies use water from the present water company?

A. I do not.

Q. What is the present capacity of your own private pumps?

A. I have no idea, but we get a surplus of water all the time.

Q. You don't know the capacity of your own pump?

A. No.

Q. What did the well cost from which you supply your mill?

A. About $300.

Q. Was it not true that on these rates running from 35 cents per

thousand for the first ten thousand gallons down to ten cents per thousand, that there was a discount?

A. Not that I know of. There was a discount of ten per cent. for cash in the bills for the minimum quantity used.

Q. Is it not true that if you use enough water from the present company, that you finally get a larger discount than ten per cent.?

The defendant objects to the question, because the complainant can produce his rates and show what they are, and what the discounts are.

A. I know nothing about any additional discount. I have never heard of it.

Q. Have you ever tried in any way to ascertain the amount of water you are using per day now?

A. Never have. I have had no occasion to do so, because we are pumping more than we have any use for, and a constant stream running to the sewer all the time, and operating the pump as slowly as we can to move it.

Re-examined by Mr. GEO. W. JOLLY, attorney for defendant, City of Owensboro:

Q. You mentioned something about some ice plant using water from the present water works company, which plant is that?

A. The Owensboro Ice & Cold Storage Company, as I have understood.

Q. You do not know the fact, do you?

285 A. Only from hearsay.

Q. Is that the new ice company that was established here this summer?

A. No, the old company.

Q. Could you state approximately what it now costs you to supply yourself with water by the well per annum under the system you are now operating under?

A. No, I could not, but it is very small. The fact is, I do not think it requires any additional steam to operate the pump, and we have never had a dollar's worth of repairs to put on it since it was installed. The only expense, which is indirect, attached to the operation of the pump is the use of compound in my boilers to prevent scales, and the necessity of cleaning out the boilers, pumps and pipe on Sundays. This, I suppose, would amount to $150 or $200 a year.

Re-cross examined by Mr. W. W. DAVIES, for complainant:

Q. I will ask you whether you consider your present method of supplying your plant with water for manufacturing purposes a very cheap and reasonable method?

A. Yes, I do, but I would much prefer using soft water and paying that much for it.

"Signature waived."

Mr. BRANSFORD appeared and desired to make certain corrections in his deposition, which are as follows:

Examined by Mr. GEO. W. JOLLY, att'y for the defendant, City of Owensboro:

Q. You can make such corrections as you desire.

A. In my deposition yesterday, I stated that the Owensboro Water Works Company charged me 15 cents per thousand gallons for water, and that my annual water rent was about $150.00. I find that instead of there being a fixed charge of 15 cents per thousand gallons, and the charge was 15 cents for the first four hundred thousand gallons, 12½ cents for the next 500,000 gallons, and 10 cents per thousand for the balance. Those were the rates prevailing prior to April 1, 1896.

I stated yesterday in my deposition that their present rates were 35 cents for the first ten thousand gallons; 30 cents for the second ten thousand; 25 cents for the third ten thousand, etc. I find the rates are as follows: 35 cents for the first 30000 gallons; 30
286 cents for the second 30000; 25 cents for the third 30000; 20 cents for the fourth 30000; 15 cents for the fifth 30000; 14 cents for the sixth 30000; 13 cents for the seventh 30000; 12 cents for the eighth 30000; 11 cents for the ninth 30000; 10 cents for the tenth 30000; 9 cents for the eleventh 30000; 8 cents for the twelfth 30000; 7 cents for the thirteenth 30000; 6 cents for the fourteenth 30000. This graduated scale of prices is for so much water used per month.

Q. You are making those statements from bills you have here. I will ask you to file those bills as part of your deposition from which you have made that statement?

A. I will do so.

Q. And mark them A, B, C, for identification, and write your name across the back of them?

A. I will do so.

The complainant objects to the entire corrections of alleged errors, and the giving and reading of the graduated rates just read by the witness, and to the filing of the bills.

A. I also stated in my deposition yesterday that at the increased rates, my water rent would be between $500 and $600 a year. I should have stated that having increased my mill capacity, and evaporating more water, that this would have accounted in some measure for the increase, although I find that I have used as much as 189,000 gallons of water a month. My bill for that month under the old rate was $28.36, while under the new rates, consuming the same quantity of water, it would have been $42.87. Those are all the corrections I wish to make.

The complainant enters the same objection to this statement last made as given immediately above.

Q. The paper which you have filed marked "A," by whom was that paper rendered to you?

Objected to by complainant.

A. By the Owensboro Water Works Company.
Q. It is signed by H. P. Martin, superintendent, by Moorman?

Objected to by complainant.

A. Yes.
Q. The paper which you have filed marked "B," by whom was that rendered to you?

Objected to by complainant.

A. By the Owensboro Water Works Company.
Q. That is signed by H. P. Martin, superintendent?
A. Yes.
Q. The paper which you have filed marked "C," of December 1, 1900, by whom was that rendered to you?

287 Objected to by complainant.

A. By the Owensboro Water Works Company.
Q. Are these papers receipts for payment for water or of accounts for water?

The complainant objects to all the foregoing questions in regard to the three papers, A, B, C, as new matter.

A. Yes.
Q. Were these bills all paid by you?

Objected to by complainant.

A. They were.

NOTICE.—If the water rent is not paid on this service within ten days after it is due, the water will be turned off, and not turned on again until all back rents due on this service are paid.

Attachment No. 224.

OWENSBORO, KY., *Apr.* 1, 1896.

Mr. C. W. Bransford to the Owensboro Water Works Co., Dr.

Incorporated.

(Less cr. from March acc't, 54c.)

Meter rent from Apr. 1, 1896, to Apr. 30, 1896	$12.68
Less cr	54
	$12.14

11656 statement of meter April 30, 1896.
6686 " " April 1, 1896.
4970 cubic feet, or 37275 gallons.

1st	30,000 gallons	per mo. or less, per 1,000.....	35 cts.	10.50
2d	"	"	30 cts.	2.18
3d	"	"	25 cts.	.....
4th	"	"	20 cts.	.....
5th	"	"	15 cts.	.....
6th	"	"	14 cts.	.....
7th	"	"	13 cts.	.....
8th	"	"	12 cts.	.....
9th	"	"	11 cts.	.....
10th	"	"	10 cts.	.....
11th	"	"	9 cts.	.....
12th	"	"	8 cts.	.....
13th	"	"	7 cts.	.....
14th	"	"	6 cts.	.....

288 Any amount in excess of 14,000 gallons per day at 5c. per 1,000 galls.

Received payment,

H. P. MARTIN,
Superintendent,
By MOORMAN.

Paid under protest. May 5/96.

O'BORO WATER WORKS CO.,
Per OWEN MOORMAN.

A. C. W. Bransford.

NOTICE.—If the water rate is not paid on this service within ten days after it is due, unless the company at its own option extends the time, the water will be turned off, and not turned on again until all back rates due on this service are paid.

Attachment No. 224.

OWENSBORO, KY., *April* 1, 1896.

C. W. Bransford.

Mr. C. W. Bransford to the Owensboro Water Works Co., Dr.

Incorporated.

Water rates, per meter, payable at end of each month.

To water used for month ending Mar. 31, 1896.

13817 statement of meter Mar. 31, 1896.
13372 statement previous bill, Mar. 31, 1896.

445
6686

7131 cubic feet, 53482 gallons at 10 cts. per 1,000..... ..... $5.35

Cr. by rebate.

H. P. MARTIN, *Supt.*

Permit.

When this bill is receipted by the water company, it becomes a permit to use water for the period specified, from the fixtures and for the purposes assessed, and subject to the rules of the company. It is granted on these conditions and is the duty of the consumer to familiarize himself with said rules.

289 Water consumed through meter from April 1/95–April 1/96—985672 gals.

4000,000 gals. at 15c. per 1000	$60 00
5000,000 gals. at 12½ per 1000	62 50
85,672 gals. at 10c. per 1000	8 56
	131 06

131.60 cr. by over pay, 54c.

Paid from April 1/95, to March 1/96, for month of April, 1896.

B. C. W. Bransford.

If this bill is paid within ten days from date a discount of 10 per cent. will be allowed on same.

NOTICE.—If the water rent is not paid on this service within ten days after it is due, the water will be turned off, and not turned on again until all back rents due on this service are paid.

Attachment No. 224.

OWENSBORO, KY., *Dec.* 1, 1900.

Mr. C. W. Bransford to the Owensboro Water Works Co., Dr.

Incorporated.

Meter rent from Nov. 1, 1900, to Dec. 1, 1900.

Gross amount	$3.00
Discount	.30
Net amount	$2.70

88100 statement of meter Dec. 1, 1900.
87300 statement of meter Nov. 1, 1900.
800 cubic feet, or 6000 gallons.

1st	30,000 gallons per mo. or less, per 1,000	35 cts.	.....
2d	" "	30 cts.	.....
3d	" "	25 cts.	.....
4th	" "	20 cts.	.....

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5th	"	"	15 cts.	.....
6th	"	"	14 cts.	.....
7th	"	"	13 cts.	.....
8th	"	"	12 cts.	.....
9th	"	"	11 cts.	.....
10th	"	"	10 cts.	.....
11th	"	"	9 cts.	.....
12th	"	"	8 cts.	.....
13th	"	"	7 cts.	.....
14th	"	"	6 cts.	.....

Any amount in excess of 14,000 gallons per day at 5c. per 1,000 galls.

Received payment,

——— ———,
Superintendent.

C. C. W. Bransford.

3. Also the deposition of Charles Broeker, taken at the same time and place and for the same purpose.

Examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro:

Q. State your age, residence and occupation. Also state the business in which you are engaged?

A. Age, 41; residence, Owensboro, Ky. I am engaged in the milling business.

Q. How long have you lived in Owensboro?

A. A little over eight years.

Q. You say you are engaged in the milling business; state what sort of manufactures you make?

A. Flour, meal and feed.

Q. What is the daily capacity of your mill?

A. About 250 barrels of flour per day.

Q. Where is your mill situated?

A. On First and Crittenden in the city of Owensboro.

Q. Do you obtain your water supply for the use of your mill from the Owensboro Water Works Co., or did you at any time, if so, for how long?

A. I think I got my water supply from them until 1897.

Q. What time in 1897?

A. November 1st, I think.

Q. Since November 1, 1897, how have you obtained water for the use of your mill?

A. I have obtained it from the river by driving a pipe from the mill to the river, and pumping the water from the river.

291 Q. Why did you cease to take water from the Owensboro Water Works Co.?

A. The rates got too excessive.

Q. When were the rates increased, if they were increased at any time?

A. I think it was sometime in 1897.

Q. Was it in 1896 or 1897?

A. I think now it was in 1896.

Q. Prior to the increase, what did you annually pay for water rent, state approximately?

A. $60 a year.

Q. Under these increased rates what did your water amount to?

A. The water amounted to from $15 to $19 a month as long as I used it.

Q. When did you put in this pipe to the river?

A. 1897, I think. I don't remember the month when I put it in.

Q. I will ask you to state what your rate up to June 1, 1896, then what the rate was afterwards, up to September 30, 1896?

A. Up to June the rate was $60 per annum, and from that time on the water works company increased the rates: from June 1st to June 30th I was charged and paid the Owensboro Water Works Co. for water furnished $15 78; from July 1st to July 30th, 1896, $15.90; from August 1, 1896, to August 31, 1896, $19.44; from September 1, 1896, to September 30, 1896, I was charged $14.92 with 12½ per cent. discount.

Q. Why did you cease to use water from the Owensboro Water Works Company?

A. Because it cost too much.

Q. Could you not afford to pay those rates in your business?

A. No.

Q. How long have you been engaged in the milling business, Mr. Brocker?

A. About 25 years.

Q. Have you the management and control and superintendence of your manufacturing plant here in Owensboro?

A. I have.

Q. I will ask you to state, if in your judgment, any merchant miller manufacturing flour as you are, and in about the quantities that you manufacture, can afford to pay the rates that are now charged by the Owensboro Water Works Company?

292 Objected to by complainant on the ground that it is irrelevant, and then on the ground that it is stating a conclusion.

A. All the mills that I have operated, that I have been engaged in of the size I now have, have never paid more than $100 to $150 a year for city water.

Q. Can a miller, such as you are, afford to pay these rates?

Objected to by complainant on the ground that it is irrelevant and is stating a conclusion.

A. I don't think they could.

Q. You spoke of having been engaged in the milling business elsewhere. Where else have you been so engaged?
A. At Springfield, Ill., and also at Greenville, Ill.

Cross-examined by Mr. W. W. DAVIES, for complainant:

Q. Is your mill situated on the river bank?
A. Yes.
Q. Directly on the bank?
A. Yes, about 50 or 60 ft. of the top of the bank.
Q. Are you familiar with the discounts allowed by the present water company for large quantities of water furnished to manufacturing concerns?
A. I think there was a discount of five cents on every ten thousand gallons, 35 cents for the first 1000, 30 cents for the next, etc. I believe that's the scale.
Q. That is the scale to which you refer. I ask you if you are familiar with the discounts allowed for payments within a certain time by the present water company?
A. The only discount was the discount of 12½ per cent. in 1897. I don't know anything of the present discounts since I discontinued taking the water.
Q. What does it cost you at present to pump your water?
A. I think it costs me about $5 a month.
Q. How do you calculate that?
A. I calculate the time and the annoyance I have with the pump. I have to go down and take the pipes off and put them on as the river goes down or comes up. I have to renew the plungers quite often, and I know it takes some fuel to run the pump. Of course I can't say exactly how much, but I know it takes some.
Q. Are you connected in any way with the city government here?
A. I have just been put in as councilman.
Q. You are one of the councilmen of the city?
A. Yes.
293 Q. Have you ever applied for any special manufacturer's rates to the present water company?
A. Not since I changed.

Re-examined by Mr. GEO. W. JOLLY for the City of Owensboro:

Q. When were you elected a member of the common council of the city of Owensboro?
A. About two weeks ago, to fill a vacancy.
Q. Occasioned by the resignation of Mr. Breidenbach?
A. Yes.

Re-cross examined by Mr. DAVIES for complainant:

Q. Have you ever held city office before?
A. No.

Q. How long have you been living in Owensboro?
A. A little over eight years.
Q. Have you been a citizen of the city during that time?
A. Yes.
Q. Were not the taxes raised by the city in 1896 on the water company?

Objected to by defendant.

A. I have heard so.
Q. Do you know it as a public fact?

Objected to by defendant.

A. Yes.

"Signature waived."

Also the deposition of Mr. Charles A. Haney, taken at the same time and place, and for the same purpose.

Examined by Mr. GEO. W. JOLLY for the City of Owensboro:

Q. State your age, residence, and whether or not you hold any office under the city government, and state what it is?
A. 50 years; residence, Owensboro, Ky. I am chief of the fire department.
Q. How long have you held the position of the chief of the fire department?
A. Since the middle of last January.
Q. Did you have occasion about the 2nd of last July to
294 attend a fire that occurred here in Owensboro in which some of the buildings of the Marsden Company and part of the plant were destroyed?
A. Yes.
Q. How long were you there?
A. From about half past nine o'clock until two or three o'clock in the morning.
Q. When did the fire break out?
A. About nine o'clock in the evening.
Q. I wish you would state whether or not there was an adequate supply of water furnished by the Owensboro Water Works Company that night for the extinguishment of that fire?

Objected to by complainant on the ground that the witness has not yet stated proof of his knowledge of the supply of water.

Q. Did you have charge of the city fire machinery there that night?
A. Yes.
Q. Did you observe what went on as to water supply and all that?
A. Yes.

Q. Now, then state whether or not there was a sufficient supply of water?

A. No.

Q. How many hours were there when there was not a sufficient supply?

A. The water furnished at the Clay Street hydrant was not sufficient. We had two streams turned on from that hydrant.

Q. What do you mean by saying that it was not sufficient—quantity or pressure?

A. It would not throw the water up to the fire.

Q. Do you know whether or not the valves were thrown open fully?

A. Yes.

Q. That — a pretty large fire, was it not?

A. Yes.

Q. State whether or not, if there had been a sufficient supply of water that night the fire could have — gotten under control any sooner than it was?

A. I don't know whether we could have done anything with that fire after it got started—the big building with the corn-stalks in it. It had a pretty good start when we got there.

Q. Where was the fire?

A. The cellulose works between Boliver and Crittenden. This fire was in the building up on Boliver.

295 Q. How many streams did you have there that night?

A. Four turned on.

Q. The water was insufficient from two of them?

A. Yes, at least it wouldn't throw water up on number four building to the eaves of the roof where the fire was.

Q. How high was it up to the eaves?

A. I suppose the building is probably 40 or 50 feet high.

Q. You were unable to get the water up to the eaves from those two streams from the Clay Street hydrant?

A. We were unable to. Finally we got the water up there by carrying the hose up into the building and poking it out of a window.

Q. We are talking about from the ground?

A. No, we could not.

Q. What size streams were they?

A. The nozzle was an inch nozzle.

Q. This hydrant that you are speaking of is located at the corner of Clay and Main streets?

A. Yes.

Q. You had two hose attached to that hydrant?

A. Yes.

Q. Of one inch each?

A. One inch nozzle. About 2½ inch hose.

Q. And the nozzle one inch?

A. Yes.

Cross-examined by Mr. W. W. DAVIES for complainant:

Q. Mr. Haney, in this cellulose plant up there, you say that it was the corn stalks that got afire?
A. Yes.
Q. Was that a warehouse with stalks in it?
A. Yes.
Q. What sort? Were they green or dry stalks?
A. I never examined them. I suppose they were dry.
Q. You are familiar with the kind of stalks they haul in now?
A. I never examined any. I have seen them hauling them.
Q. Were they green corn stalks or dry?
A. I don't think they were green. They looked dry.
Q. They keep a large quantity there?
A. Yes. I forget the amount.
Q. It was the warehouse with these corn stalks in it on fire?
A. Yes.
296 Q. You say you had four streams running?
A. Yes.
Q. How many water plugs were accessible to these hose lines at the time?
A. Only two.
Q. You had two hose lines from each plug?
A. Yes.
Q. Any more plugs in that neighborhood at all?
A. Yes, one on the corner above, and one on the corner below.
Q. How high was the stream of water thrown before you carried these hose up in the warehouse to the window?
A. It would barely reach to the eaves of the roof on this side—40 feet.
Q. You say you carried it up to the window, and then you could reach the roof with it?
A. Yes.
Q. You carried the hose up to the window did you not?
A. No; I think it was a section of the hose from the cellulose company that we carried up to the window.
Q. That threw the water up to the window.
—. ——.
Q. That threw the water up to the eaves?
A. Yes.
Q. Was this failure to get water, or rather a sufficient stream of water, due to lack of pressure, or what was it due to?
A. I hardly know what was the matter.
Q. You are an experienced fireman, are you not?
A. I don't know why they could not get the pressure down there.
Q. Was it due to lack of pressure?
A. In my opinion it was. At Boliver street they threw a pretty good stream, but on Clay street they could only throw this water 40 or 50 feet.
Q. That was running at the same time?

A. Part of the time; but at one time we had only one section turned on from the Boliver Street plug.

Q. The Clay Street plug, and the Boliver Street plug are both connected with the same water works are they not? And operated by the same engine?

A. Yes.

Q. How was it, Mr. Haney, that the pressure would not carry the water from the ground up to the eaves of the roof, but would do so when you carried the hose up into the warehouse to a window?

A. We took it up half way of the building so that it would reach. It wouldn't reach from the ground up to where the fire was.

297 Q. How high were those eaves?

A. About 50 feet.

Q. It would take the same pressure to carry this water 50 feet above the level of the ground no matter where you put your nozzle, would it not?

A. I suppose so. I telephoned to the water works for more pressure, and I understood they had all the pressure on they had. Then they put this line of hose up in the building to put this fire out.

Q. You said a moment ago that the Boliver Street plug was running better than the Clay Street plug, how is that?

A. I don't know unless it was due to the main running down the street there being small, and the plug below took the pressure off of the plug above.

Q. If you were running at the same time, and both were operated by the same engine, would one throw water to one height, and the other throw water to another height?

A. I say the hose attached to the plug on Boliver street took the pressure off the other plug.

Q. Why?

A. Because the water comes direct from the power house down that way.

Q. Does it not come up Main street and up the same way?

A. I understand it comes down that way.

Q. Did you see it laid?

A. Yes.

Q. Did you see the other pipe laid?

A. I have seen a good deal laid.

Q. You don't know the route of the Boliver Street pipe do you?

A. No.

Q. Do you know anything about the size of the Boliver Street pipe and the Clay Street pipe?

A. No. I think these hydrants are attached to the Main Street pipe.

Q. Who turned on the water at Clay street?

A. Mr. Bratchey.

Q. Were you there when he turned it on?

A. No.

Q. Do you know that it was turned on of your own knowledge?

A. Yes, I went back to see. Some one said they had not turned it on, and I went back and tried the plug.

Q. How did you try it?

A. I turned the wrench.

298 Q. How many times?

A. It was all turned on.

Q. Then, you didn't turn it?

A. No, it was all on.

Q. How many times had it been turned?

A. I don't know how many turns it takes to turn it on. It would not turn any more, however, it was all on.

Q. You did not turn it at all?

A. No.

Q. When was it that you went there and tried to turn it?

A. I suppose half an hour after the fire had started.

Q. You do not know, then, of your own knowledge why the hose when carried up into the building to a window would throw the water to the eaves, while it would not do it from the ground?

A. I suppose it did not have pressure enough.

Q. You said a while ago they had all the pressure they could get on?

A. Yes, I don't know what was the reason, only from this fact that the hose that was attached to the Boliver Street plug took the pressure off of the Clay Street hydrant.

Q. They threw different streams?

A. Yes.

Q. How long after the Clay Street hydrant was turned on was the Boliver Street hydrant turned on?

A. I suppose they were both on at the same time.

Q. Now, suppose Mr. Hanley, that you had a pressure of 86 pounds in a normal straight pipe, and a three-fourths inch nozzle, about how high would that throw the water in your opinion?

A. I could not state anything of that kind.

Q. Is it not true that with 86 pounds of pressure with an inch nozzle, it will throw the stream of water higher than a three-fourths inch nozzle?

A. I have never seen that tested. I don't know about that.

Q. How long have you been connected with the fire department of this town or any other?

A. Since last January. I used to be a member of the company years ago.

Q. Was it a volunteer company or not?

A. Volunteer, when I belonged to it.

Q. I will ask you whether or not a stream of water under say 100 lbs. pressure, thrown from an inch and a half nozzle would be more effective in putting out fire than a stream of water with the same pressure from an inch nozzle.

299 A. I couldn't state to you about that at all, I never saw it tried.

Q. You don't know that?

A. No.

Q. I have marked here, Mr. Haney, a paragraph in a treatise on this subject, which I will get you to read, and state whether or not from your own experience the doctrine laid down in that paragraph is true?

The paragraph runs as follows:

"Again to show the results that can be obtained from the 86 pounds pressure by simply increasing the size of the nozzles, all under the same pressure, the ¾ inch reached 116 feet; the one inch 137 feet; the 1¼ inch 150 feet; the one and one-half inch 158 feet; the 1¾ inch reach-166 feet; the two inch 169 feet. Thus, the same pressure that sends the ⅝ inch 100 feet high, send-the two inch 69 feet higher. On the other hand the 130 pounds that cut down the ⅝ inch stream from 100 to 75 feet, sends a two inch stream 230 feet high, or an improvement of 155 feet, besides delivering over 900 per cent. larger volume of water."

Objected to by defendant.

A. I would not like to undertake to make any statement in regard to that, because I have never seen any of those tests made, and I don't know about that.

Q. Then, you do not know whether that is sound fireman's doctrine or not?

A. It may be. I am not prepared to testify as to that.

Q. Suppose, Mr. Haney, that you were to have a fire this afternoon, the size of the cellulose fire, what amount of pressure would you expect from the water company?

A. I would want all I could get. All they had.

Q. You would then expect everything they could give you?

A. Yes.

Q. Is it not a fact, Mr. Haney, that too much pressure interferes with a fire by reason of the inability of the men to handle the nozzle sometimes?

A. I have never seen any time yet they could not handle it.

Q. Is it not true that too much pressure, at times, tears a building to pieces, often more damaging than the fire?

A. I suppose in a small building it would, but when we have too much pressure, we turn it off at the hydrant.

Q. You don't know then the amount of pressure it would be correct to ask for if you were to have that fire to-day?

300 A. I understand that 75 to 80 lbs. pressure is the average to be expected.

Q. What was the pressure at the time of the cellulose fire?

A. I don't know what the pressure was. I called for all they had.

Q. Who sent word to the pumping station about pressure the night of the fire?

A. I think I sent up there myself.

Q. How did you send?

A. I sent someone up there.

Q. Do you know whether they got the word or not?
A. I think so.
Q. How do you know?
A. Because they came back and told me the station had all the pressure on.
Q. You just know it from hearsay?
A. Yes.
Q. How much pressure did they say they had on?
A. I don't remember. I understood they had all the pressure on.
Q. Do you remember any hose being bursted at the time of the fire at the Troy laundry here?
A. Yes. I remember a section of hose bursting then, but I was not in the fire department then.
Q. How many sections were broken?
A. One, I think.
Q. Was that on account of the pressure in the hose?
A. I don't know what was the cause of that.
Q. Did not one section break at the cellulose factory?
A. At one of the fires before this last big one, yes; it was sometimes about May 1st.
Q. Were both lines of hose in operation then?
A. Yes.
Q. Do you know what the pressure was at this fire on May the 1st?
A. It wasn't extraordinary.
Q. Was it sufficient?
A. Hardly.
Q. What was the matter?
A. I don't know why.
Q. What damage did you suffer by not having pressure?
A. It would hardly reach up to the eaves of the roof.
Q. Did not Mr. Williams tell you after these hose lines were broken that he would not after that run so high a pressure on account of the breaking of the hose?

Objected to by defendant.

301 A. I don't remember him saying that to me.
Q. Did he say anything of that kind?
A. I don't remember.
Q. Did he not tell you that in case you wanted more pressure you must notify him?

Objected to by defendant.

A. I don't remember him saying that to me.
Q. Did you ever have any conversation with him about the pressure?
A. Well, I have talked to him about the pressure.
Q. What did you say to him in regard to this fire?
A. Well, he told me he had all the pressure on he had.
Q. How much did he say that was?
A. I never asked him the number of pounds he had on. My

understanding is they generally run the pressure up to 80 or 85 pounds, along there.

Q. Don't you know it to be a fact that they run the pressure up during the cellulose fire to 110 pounds?

A. No, I don't.

Q. Did you ever hear anybody say it was 110 pounds?

A. No.

Q. You don't know what the usual pressure is do you?

A. My understanding is that it is about 80 or 85 pounds they have on.

Q. You do not know what the necessary pressure for the city is, do you?

A. No; my impression has always been that it was from 80 to 85 pounds for fire pressure. That is what they generally put on for fire pressure.

Q. If this pressure was better on May 1st what reason can you assign for it being worse on July fire?

A. During the first fire they did not have any hose attached at the Bolivar Street plug. They just had the hose attached at Clay street.

Q. Whose business is it to attach the hose?

A. Mr. Bratchey's. I think he attached one section of hose there, and I think there was a second section of the hose attached from the upper house.

Q. In case of a fire the water company does not go out and attach the hose itself does it?

A. No.

Q. Who does it?

A. The fireman.

Q. You stated a while ago that the pressure was better at the fire in May than it was in July. What do you assign as a reason for that?

A. Because there was no hose attached at the Bolivar Street hydrant.

302 Q. W[illegible]?

A. Didn't need it.

Q. Was one sufficient?

A. Yes.

Q. You said a moment ago that the service was not extraordinarily good, though?

A. Yes, I did, when they had the hose attached to the Bolivar Street hydrant, and also to the Clay Street hydrant.

Q. You have said at one of these fires they only had one of the lines in use?

A. Yes, in the May fire.

Q. If that service was not extraordinary, why did you not attach the other one?

A. It was to- far off from the fire. The fire was right in front of us.

Q. Was it impossible to reach it?

A. No. There wasn't much of the fire there.

Q. Why didn't you get the other one then?

A. We carried the hose around up into the building, and put the fire out.

Q. It was good and sufficient then?

A. Yes, when we carried it up into the building.

Q. Why would the pressure be more effective after carrying the hose up into the building than it would from the ground? Under the laws of hydrostatics, why won't a hose throw water as high from the ground under a given pressure as it would from some height in a building?

A. I don't know. It wouldn't do it. It just wouldn't throw it up there.

Q. You have no hypothesis for it whatever?

A. That's just the way it was. It wouldn't throw it up there.

Q. You are not able then to explain why it is that a hose carried up into a building will reach a higher point than the same hose would reach with the water from the ground below?

A. You don't have sufficient pressure to throw it up there.

Q. Why couldn't you reach it from the ground?

A. I don't know.

Q. If there is any hypothesis about it, it must be one in regard to some defect in your hose?

A. The hose were al-right.

Q. If the hose were al-right and the pressure was the same and you reached a better result by going up into the building with the hose, what kind of a theory could you have?

303 A. I can't explain it to you, only it did not throw the water up there from the ground. Mr. Williams could tell you.

Q. So you think Mr. Williams understands the water business better than you do?

A. I expect he does. He knows the reason why.

Q. Did you have any new hose in use in the fire of July?

A. Yes.

Q. So there is ground for thinking that the defects in the May fire may have been in the hose, is there not?

Objected to by defendant.

A. I don't know. They were good hose—brand new. Never had been used before.

Q. You had new hose in the July fire, did you not?

A. Yes.

Q. What is the size of nozzle used here now?

A. One inch.

Q Mr. Haney, if the nozzle is too small, is it not true that the pressure of the engine will cause the water before it reaches the point to which it would go, to spray?

A. I suppose it would spray more out of a large nozzle.

Q. If the water sprays then it is apt to turn to steam more quickly than it would if it were in a solid stream?

A. Yes, I suppose it would.

Q. There is then a pressure somewhere that will cause the water from a one inch nozzle to spray, is there not?

A. It is owing to the pressure you get on it, I think.

Q. There is some kind of a pressure that will do it?

A. Yes.

Q. That same pressure from a larger nozzle would not cause the water to spray would it?

A. Not so much as it would from a small one.

Q. A spray of water is not as effective as a solid stream, is it?

A. No.

Q. Did Mr. Williams, of the water company, send down an extra nozzle for use in the July fire, or not?

A. I don't remember of seeing it.

Q. You don't remember any extra nozzle sent down?

A. No.

Q. How long was each line of hose from the Clay Street plug, and from the Bolivar Street plug?

A. I suppose they were about 500 feet each? Now, the Clay Street line was a little longer than the Bolivar Street line probably.

Q. Do you know anything about what the friction is on that much hose?

304 A. No.

Q. Do you understand the theory of friction on hose and pipe?

A. No.

Re-examined by Mr. GEO. W. JOLLY, for the City of Owensboro:

Q. Mr. Haney, were the hose lines attached to the nearest hydrants to the fire you have been speaking about?

A. Yes.

Q. Mr. Davies has asked you some questions about a fire that occurred in May at the cellulose plant near the same place of the fire of July 2nd, and seems to think that it was strange that the pressure was a shade better at the fire in May than it was in July. Was that not due to the fact that you had four pieces of hose attached to the hydrants in July, and only two pieces in May?

A. Yes.

Q. Well, Davies is also bothered about the fact that you can throw water only forty feet from the ground, but you can carry the hose up into the building and pour the water out up there?

A. Yes, you can do that.

Q. Mr. Haney, in cases of fire here in Owensboro, what, if any, system have you of apprising the water works of the fact that a fire has broken out?

A. They have an alarm system.

Q. That communicates the fact of the fire to the engine houses, and to the water works at the same instant does it not?

A. Yes.

Re-cross examined by Mr. DAVIES, for the complainant:

Q. Did they carry the water up above the building, and pour it down on the fire?
A. No, they threw it up.
Q. So the language "pouring the water on the fire" does not apply to this particular fire?
A. They turned it on to the fire.
Q. The term "pouring the water on the fire" does not apply to it, does it?
A. They threw the water on the fire.
Q. They did not pour it on the fire?
A. No, threw it on the fire.

305 Q. You say in the last questions, in regard to the fire in May that you had more hose attached to the fire in July than you did in May. Why did you not attach as much at one fire as you did at the other?
A. Did not need it.
Q. Whose business is it to attach that hose?
A. The fireman on each reel is to attach the hose to the hydrants
Q. Were the fires about the same?
A. In what respect?
Q. As to size?
A. No. The first fire in May was an explosion which did not amount to much.
Q. The other one was a big fire, was it?
A. Yes. The first fire was an explosion in No. 4 building.
Q. If you did not need any more hose or streams of water, then you had nothing to complain of had you?
A. Certainly not.

Re-examined by Mr. GEORGE W. JOLLY, for the City of Owensboro:

Q. You spoke of some hose bursting down here at one time, was that some old hose?
A. Indeed, I don't know. I was not a member of the company at that time. That's been a couple of years ago.
Q. Is it not a fact that the city had some old hose?
A. Yes, they have some old hose that has been in use since 1883.
Q. And some of that hose was split or burst?
A. Yes.
Q. The fire at the cellulose works in May was an insignificant affair compared to the one in July, was it not?
A. Yes.

"Signature waived."

Also the deposition of Mr. E. B. Shifley, taken on December 18, 1900, at the same place, and for the same purpose.

Examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro:

The witness, being first duly sworn, deposed as follows:

Q. State your age, residence and present occupation?

A. My age is 35; I live at Owensboro, Ky.; my occupation is that of city engineer.

306 Q. Are you a civil engineer?

A. I am.

Q. How long have you been acting as a civil engineer?

A. For something over 15 years.

Q. What sort of work have you been engaged in?

A. Municipal work principally.

Q. In general municipal work?

A. Yes.

Q. Have you had any experience in planning water works systems, and laying pipe, such work as that?

A. I have.

Q. In what cities have you been engaged in your work as civil engineer?

A. Bucyrus, O.; Bellevue, O.; Spokane, Washington; Plainfield, N. J.; Sewickley, Pa.; Richmond, Ind.; Cambridge City, Ind.; Milton, Ind.; Toplin, Ind.; Olympia, Washington; Galion, O., and Owensboro, Ky.

Q. State whether or not you, in company with Mr. Wigal, of Henderson, and Mr. Sturtevant, of Chicago, and Mr. Cummings, of Owensboro, visited the pumping station of the Owensboro Water Works Company last spring about April, and whether you made any examination of the water works plant, its pumping station, boilers, engines, etc., and of its pipe system, and whether or not you familiarized yourself with the plant, including all its property, sufficiently to make an estimate of its approximate original cost, and of the present value of their property here at Owensboro?

Objected to by attorney for complainant.

A. I visited the plant with Mr. Wigal, Sturtevant and Mr. Cummings. I don't remember the exact time. It was in the spring about April. I familiarized myself as far as possible with the pumps, machinery and distribution system so as to make an estimate of its original cost.

Q. Please state what you estimated the original cost — the Owensboro water works plant to be approximately?

Objected to by attorney for complainant.

A. $115,000.000.

Q. Please state what you estimated to be the present value of its property?

A. $84,320.00.

Q. I wish you would state in detail what property they had, what property it is that entered into this estimate of yours, for example, state how many boilers, and how many pumps, etc.?

A. There were three boilers.

Q. What did you estimate the present value of those to be?

307 A. $2,700.00.

Q. Give in detail the estimated value of the balance of the property?

A. Pump designated as number one was estimated at $4,000; pump number two at $6,000; buildings, $10,400.

Q. What does the building include?

A. That includes the building proper, without any machinery at all.

Q. You include in that building the pumping pits, etc.?

A. Yes.

Q. Now, about the pumps themselves, what did you estimate those at?

A. Pump number one at $4,000, and the other one, pump number two, at $6,000.

Q. And the suction pipe?

A. The two of them at $4,800.00.

Q. Do you include in the estimate of the building the smokestack also?

A. Yes.

Q. And the distribution system?

A. It was estimated at $84,600.

Q. What did you estimate the total cost of the pumping station, including all the pumping machinery, wells, boilers, machinery, and lot of ground?

A. Including the two lots, it was $30,400.00. That embraces everything except the distribution system.

Q. You estimated the value of the distribution system, which includes the pipes?

A. Yes.

Q. And all the incidentals?

A. The pipe lines and incidentals, castings, valves, hydrants and everything of that nature.

Q. I will ask you to give a particular statement of the amount of pipe they have of the different sizes, commencing at the largest size pipe?

A. Well, 400 feet of 20 inch, that is the suction pipe; 600 feet of 16 inch pipe, 5600 feet of twelve inch pipe, 300 feet of ten inch pipe, 10750 feet of 8 inch pipe, 60100 feet of 6 inch pipe, 28075 feet of 4 inch pipe, 1300 feet of 3 inch pipe.

Q. I will ask you to estimate what you consider the 20 inch pipe worth?

Objected to by attorney for complainant.

A. Total, or per foot?

Q. Total?

A. I have it valued at $2.33 a foot laid in the trench.

Q. What does that amount to?

308 A. $932.00.

Q. At what do you estimate the 5600 feet of 12 inch pipe?

A. $1.02 per foot, or $5,712.00.

Q. The 10 inch pipe?

A. 82 cents per foot, or $346.00. This is the net cost of these, and then I added a percentage for incidentals. It is just the net cost for the pipe in the trench, and then I have added 10 per cent. for incidentals.

Q. You mean to say that the prices you give here are for incidentals?

A. No. I have added 10 per cent. for incidentals at the end.

Q. What do you estimate the 10750 feet of 8 inch pipe at?

A. $6,342.50.

Q. The 60100 feet of 6 inch pipe?

A. 45 cents per foot, making $7,500.00.

Q. Now, the 28075 feet of 4 inch pipe?

A. $8,984.00.

Q. And also the 1500 feet of 2 inch and 3 inch pipe?

A. I called that all three in my statement; $286.00 is the estimate.

Q. Did you make any estimate for special castings?

A. I did.

Q. Did you value the water gates and boxes?

A. Yes. I gave an estimate of the amount of their castings as stated to me by Mr. Martin, superintendent of the water company.

Q. Mr. H. P. Martin?

A. I believe that is his name.

Q. Did you estimate the value of their hydrants?

A. I did.

Q. Water meters and water taps?

A. I did.

Q. I would like for you, Mr. Shifley, to state as near as you can, from examination of the water works system here, and the estimates you have made, what that plant could be duplicated for to-day at present prices, say estimating the pipe at $30 a ton, all laid down and complete, and in working order in the city of Owensboro, and out of new material?

A. At $30 a ton for castings, it could be duplicated for $114,230.00.

Q. Did you make an estimate of the annual expense of operating this plant economically and well?

A. I did.

Q. What did you arrive at as an approximately fair estimate?

309 A. $6,100.

Q. Does that include anything for wear and tear annually?

A. That includes oil and waste, and such small repairs as usually occur. It includes no breakdowns.

Q. What would be considered a fair estimate of the annual wear and tear on the plant?

A. Including depreciation?

Q. No, not including depreciation.

A. I have not at hand the amount in detail figures on that.

Q. State it then, including depreciation?

A. I have not at hand any detail figures on that. I figured that the depreciation on the whole plant would be 3 per cent. per annum. I will state that the operating expenses and wear and tear I got from previous figures of a plant that was pumping very nearly the same amount as this one, which figures I knew to be correct.

Q. You say 3 per cent. on what?

A. On the total value of the plant.

Q. On its present value?

A. Yes. That is, I took the constructive value and allowed 3 per cent. per annum from the time of construction of the plant until now.

Q. Has the Owensboro water works system any reservoir?

A. No.

Q. Any standpipes?

A. No.

Q. What sort of a system is it called?

A. Direct pressure.

Q. State whether or not there are any faults in the distribution system of the Owensboro Water Works Company, and state whether or not, in your opinion, it is so constructed as to afford adequate fire protection?

A. There is a too large percentage of small pipe to afford adequate protection against fires along the lines of these small pipes.

Complainant's attorney objected to the foregoing question and answer.

Q. What is the fault?

A. There are too many lines of small pipe.

Q. Can there be a sufficient pressure to throw water, in case of fire, along the line of small pipe?

A. There can not. But I would like to modify my answer. It depends. In two hose attachments it can not. With a single hose, yes.

Q. Suppose they were to put on three or four hose attachments?

310 A. They would not have sufficient pressure.

Q. Is it possible to secure sufficient pressure with three or four hose attachments?

A. Not on the same pipe, small pipe.

Q. What do you mean by the small pipe?

A. 4 or 6 inch. It is not possible to get sufficient pressure with a six inch main with four hose attachments.

Attorney for complainant objects to all the questions and answers with reference to pressure and fire service.

Q. Is there any system of filtration used by the Owensboro Water Works Company here in Owensboro?

A. No.

Q. State whether or not the water is pumped direct from the river into the mains to the consumers?

A. It is.

Q. If the river is muddy and the water in a filthy condition, does the water go directly to the consumers through the mains of this company?

A. It does.

Q. Do you consume water yourself, at your own house?

A. I do.

Q. Delivered to you by the Owensboro Water Works Company?

A. Yes.

Q. Is the water during the times of high water in the river muddy, and if so, is it fit for domestic service in that condition?

A. It is not fit for domestic service without sedimentation. It was impossible to use it at home during the last month without settling it.

Cross-examined by Mr. W. W. DAVIES, attorney for complainant:

Q. How many cities have you been in as engineer?

A. I don't know as I could tell you. I named them before.

Q. About a dozen, wasn't there?

A. Yes. I have not been city engineer in that number of cities. I have been city engineer in half that number of cities.

Q. You have been in the profession about 15 years?

A. Yes.

Q. You have not been in any city very long?

A. I was six years in one city.

Q. What city?

A. Bucyrus, O.

Q. What are the duties of a city engineer?

311 A. Well, his duty pertains to all municipal affairs, to the construction and maintenance of municipal work.

Q. What is that line of work?

A. Well, it is somewhat different in different cities.

Q. Well, ordinarily, in a city like those you have been in, what has been the general line of work?

A. Well, such work as cities do; street improvement, and if the city owns a water works plant, the construction and maintenance of the water plant.

Q. Which of those cities own their own water works?

A. Cambridge City, Ind., does.

Q. How long were you there?

A. 18 months.

Q. Were your in Owensboro at the time the present water company put its plant here?

A. No.

Q. Did you see the company's plant in course of construction?
A. No.
Q. Have you examined the pipes in the trenches of the Owensboro Water Works Co.?
A. I have seen a great deal of it this summer in excavating the streets, and making improvements here.
Q. You saw that just in the course of excavating the streets, just as it would be unearthed, did you not?
A. Yes.
Q. How much water pipe has the Owensboro Water Works Co. in the city and around it?
A. Total amount?
Q. Yes.
A. I have only got it in detail. I don't know at the present time, but last spring, when I examined it, if I have made no mistake in the addition of the several items here, there is 107125 feet of pipe.
Q. That ranges in size from what minimum up to what maximum?
A. From 3 inch up to 20 inch.
Q. And it ranges in weight from what minimum up to what maximum?
A. 175 pounds per foot, to 16 pounds per foot.
Q. Well, now, you take a 6 inch pipe, what will be the weight of that?
A. It would be about 400 pounds.
Q. What is the standard?
A. Standard size would be 396 as the standard weight, or 33 pounds per foot.
Q. Per lineal feet?
A. Yes.
312 Q. What sort of pumps are those pumps number one and two up there?
A. Condensing pumps.
Q. What is the make of those pumps?
A. Those pumps were made by a Buffalo firm. I have the name as the Buffalo Pump Company. They were partly rebuilt by the New Albany Pump Company.
Q. Have you ever put in any pumps?
A. No.
Q. How did you arrive at the value of those pumps?
A. The value of those pumps I obtained through Mr. Sturtevant, who stated that he had obtained it from the manufacturer.
Q. You don't know of your own knowledge?
A. No.
Q. How much of a system have you ever put in?
A. I have made estimates on systems, and put in pipe lines a number of times in water works systems, in controversies of this kind.
Q. How long have you been city engineer of Owensboro?
A. About 7 months, I think. Since the middle of last March.

Q. You came in about the time this controversy began, did you not?

A. Yes, I believe about that time. I came in a short time before the ordinance was read establishing a rate. I don't know whether that was the beginning of the controversy or not.

Q. Have you ever been in the pump manufacturing or selling business?

A. No.

Q. Ever been in the pipe manufacturing, selling or dealing business?

A. No.

Q. Can you estimate in miles approximately the pipe system of the present water works company?

A. Yes.

Q. About what is it?

A. It would make about 22.8 miles.

Q. What is the depth of that pipe in the ground?

A. It would average, I judge, three feet and under. There are places where it is deeper—where it runs through a ridge, but the average, I would say, would be under three feet, what I have seen of it.

Q. I mean what was the depth of it at the time *of* this controversy began, not now?

A. It is the same.

313 Q. Have you not graded the street lately?

A. Yes, but we found some places where the pipe were so near the surface of the ground that they had to be laid deeper.

Q. Did you not cut down those places as much as five feet?

A. No.

Q. Did you not cut down as much as 40 inches at Seventh and Crittenden?

A. I don't think we did at Seventh and Crittenden.

Q. Well, near there, running east from there?

A. I don't remember the exact cut. It was somewhere near three feet. I think the estimate from the profile was about three feet.

Q. Do you know anything of your own knowledge now about what it cost to put in this entire plant, both its pumping station, its suction pipe, and its pipe system at the time the system was constructed?

A. I know from my own knowledge the amount that it should cost with proper construction. I don't know from my own knowledge what it actually cost, because there was an amount of poor engineering done.

Q. Do you know what it actually cost?

A. No.

Q. Your estimate was based on what you believe would be required to put it up at present, was it not?

A. I can't answer that question directly. My estimates were based on proper handling and construction of the plant under proper management.

Q. At what time?

A. At the prices that obtained last April, 1900.

Q. Then it was upon the basis of the prices of last April?

A. It is upon the basis of prices of bids which were made in New York city, with proper allowances for freight and handling of this place.

Q. At last April?

A. Yes. I will state, however, that the original estimate — the cost of the plant, was made as near as could be made from the original prices that prevailed at the time this plant was constructed.

Q. When was this plant constructed?

A. I have forgotten the year.

Q. About when?

A. I can't now tell you that.

Q. You don't know when this plant was constructed, do you?

A. I have forgotten it. I knew at the time.

314 Q. You said a while ago that you made your estimate on the bids and prices of last April?

A. The estimate was made two ways. The estimate was made upon a basis of $30 a ton for cast iron. I state all that in my affidavit.

Q. When you state the value of the plant, what do you base that on?

A. I base it on the present constructive prices.

Q. You have not estimated it then upon the constructive prices of the past, have you?

A. I could not obtain exact figures.

Q. You did not?

A. No.

Q. You don't know then do you?

A. I obtained as nearly as possible information of the prices obtaining at the time the plant was constructed.

Q. You said that you made your estimate on the last April prices, did you not?

A. Yes, I found those prices as near as I could, and then I made the information to accord with the prices at the time the plant was constructed.

Q. You don't know when the plant was constructed do you?

A. I did know at the time. I think it was about twenty years ago. It has been six months since I made the estimate.

Q. Where did you get the estimate of the prices at the time of the construction of the company?

A. I obtained them from the Engineering News of the bids and prices that were made at the time.

Q. Do you know of your own knowledge what it cost to build this plant?

A. No.

Q. So then you would say that you are not equipped of your own knowledge so as to say what it cost to build this plant of the Owensboro Water Company?

A. I don't know what it cost with bad engineering. I know pretty nearly what it should have cost.

Q. Have you ever constructed a water plant, suction wells, or pump wells?

A. I have not.

Q. Have you ever constructed and put in place the machinery of a water plant?

A. I have not.

Q. Have you ever constructed the tunnels leading from the pumping station to the supply of water?

A. No.

Q. Have you ever constructed a pumping station, and the
315 smoke stack, and things incident to the pumping station?

A. No.

Q. Have you ever managed a water company?

A. No.

Q. Have you ever been superintendent of a water company?

A. No.

Q. Have you ever been president of a water company?

A. No.

Q. Have you ever bought supplies for a water company, such, I mean, as the outfit of a water company going into a town to establish itself?

A. I have made estimated purchase supplies. I have never purchased directly, no, sir.

Q. You say you are city engineer of Owensboro, Ky.?

A. Yes.

Q. How did you come into that office?

A. I was appointed by the council.

Q. Of the city of Owensboro?

A. Yes.

Q. For how long a term do you hold office?

A. I was appointed for one year.

Q. Are you familiar at all with the kind of water as to its filtration, etc., of other towns or cities on the Ohio river?

A. Yes, somewhat.

Q. Have you been to Louisville lately?

A. I have been there.

Q. Did you have any occasion to see the water used there?

A. I saw the water there last summer.

Q. Was that filtered water or not?

A. I could not state from the appearance of it. The river was low at the time.

Q. Do you know whether or not it is filtered water?

A. No.

Q. Do you know anything about the water elsewhere on the Ohio river—Cincinnati?

A. I know from report, not from observation.

Q. What does a filter generally cost for a town of this size, a good

one, an efficient one, I mean to put the filter plant up in connection with the water works?

A. That is too indefinite. I have never made estimates on that. There are a half dozen different kinds of filters, and a dozen different methods of handling water.

Q. Do you remember the time of the big fire here at the cellulose works?

316 A. Yes.

Q. Do you know anything about what the pressure was at the water works?

A. I don't know what the pressure was at the beginning of the fire, nor until the fire was about burned out. I know about what the pressure was when the fire was, I will say, three-fourths over with.

Q. What was it?

A. It was in the neighborhood of 100 pounds, maybe a little above or under. This was according to the gauge at the works. Of course, I don't know whether the gauge is right or not. I presume it is.

Q. Would you call yourself an expert on the construction and operation of a water plant?

A. I would not.

Q. How long have you been a citizen of Owensboro?

A. Since I have been city engineer.

Q. Where did you come from to Owensboro?

A. Cambridge City, Ind.

Q. Where did you study engineering?

A. I have never gone to school of engineering. I have studied it in connection with the business.

Q. You have studied it then in the field?

A. You might say in the field. I have studied it with a correspondence school also, from literature, etc.

Q. Did you ever see that suction pipe down there that you spoke of a moment ago?

A. I saw part of it.

Q. How much of it did you see?

A. I could not state. I don't remember.

Q. Did you ever weigh it?

A. I did not.

Q. Did you ever see the big mains of the water company in the city?

A. I saw a 12 inch main.

Q. How much of that did you see?

A. A few feet of it.

Q. Did you ever weigh that?

A. No.

Q. Have you ever weighed the smaller pipe?

A. I have not.

Q. Have you ever been down in the suction wells?

A. I have not.

Q. Into the tunnels?
A. No.
Q. Do you know whether those suction wells are built of stone, iron or what?
A. They are built of iron—one of them at least.
317 Q. Do you know how the tunnels are constructed, whether of stone, brick or iron?
A. I never saw them. I gathered that they were brick from talking with a man who helped to build them.
Q. You don't know of your own knowledge?
A. No.
Q. There are two engines there at the pumping station, are there not?
A. Yes.
Q. Well, in speaking of engine number one you call that a Holly or a Baldwin, or what kind of an engine would you call it?
A. I do not know.
Q. In speaking of the other engine, what kind of an engine would you call that—a Holly, or Baldwin, or what?
A. I don't know.
Q. Have you ever examined these pipes to find out of your own knowledge the dates and the makers of the pipes?
A. No.
Q. The notes from which you have refreshed your memory from time to time were they notes from your affidavit in this case?
A. Yes. My affidavit was taken from the notes.
Q. Who drafted this affidavit for you?
A. The affidavit was drafted by Mr. Jolly and myself.
Q. That was when the controversy first began, was it not?
A. Yes.
Q. You have constantly referred to the notes from which this affidavit was made, have you not, during this examination to-day?
A. I had a short time to do so. I had very little time to look it up. I have been very busy.
Q. The data which you have given in detail, has been from that affidavit, has it not?
A. From which the affidavit was made, yes.
Q. The affidavit was based on that, was it not?
A. Yes.
Q. Who drew this affidavit for you?
A. The affidavit was gotten up by Mr. Jolly and myself, in his office.
Q. It was signed by you?
A. Yes.
Q. Prepared by Mr. Jolly?
A. Partly so, and part by myself.

318 Re-examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro:

Q. State whether or not there has been a large amount of street construction in the city of Owensboro in the summer of 1900?
A. Yes.
Q. About how many miles of street construction has there been laid out and constructed, excavated, etc.?
A. I think about three miles has been excavated and under course of construction.
Q. In the course of this excavation that has been made in the streets, have you had occasion to examine the water pipe?
A. I have.
Q. Have there been sewers laid in the streets?
A. Yes.
Q. Any large amount of sewer pipe?
A. About 8 miles, I presume.
Q. In making the excavation for the sewers have you seen the water pipe of the Owensboro Water Works Co.?
A. Yes
Q. I understood from you that in making your estimates of the prices of material and the cost of labor, you obtained prices that prevailed at about the time of the construction of the Owensboro water works plant, from the Engineering News, is that right?
A. No, at the time we made our estimate.
Q. Of present prices, or prices that obtain at the time of construction?
A. Yes, from actual bids on water works plants.

Attorney for complainant objected to the foregoing question and answer.

Q. At what price per ton of iron pipes, etc., then did you make your estimate?
A. $30.00 per ton.

Attorney for complainant objected to the last question and answer.

Q. As to the preparation of your affidavit, is it not a fact that you dictated your affidavit yourself to the stenographer, and afterwards filled in the amounts yourself, and brought the affidavit to Mr. Jolly?
A. The affidavit was gotten up by us in conjunction, and was printed by the typewriter. I did not dictate directly to the typewriter.

"Signature waived."

319 Also the deposition of Mr. F. A. Ames, taken at the same time and place, and for the same purpose.

Examined by Mr. GEO. W. JOLLY, attorney for the City of Owensboro:

The witness being first duly sworn, deposed as follows:

Q. State your age, residence and occupation, or business?
A. Age, 41; residence, Owensboro, Ky.; I am a carriage manufacturer.
Q. How long have you been a resident of Owensboro?
A. About 16 years altogether, probably 18.
Q. What business were you engaged in in 1895 and 1896?
A. Manufacturing carriages.
Q. Have you been continuously engaged in that business since that time?
A. Yes.
Q. Where is your factory located?
A. On the corner of Third and St. Elizabeth streets in Owensboro, Ky.
Q. About how many hands have you employed in your business, Mr. Ames?
A. At present I should say 135. I run from 100 to 160 hands.
Q. About how many carriages do you make a year?
A. Last year a little short of 6000—5700.
Q. In 1895-'6-'7 did you obtain water from the Owensboro Water Works Company in your business here at Owensboro?
A. Yes.
Q. At what rate did they charge you in 1895 and 1896 up to April the 1st?

Objected to by attorney for complainant.

A. I had a flat yearly rate of $60.00 or $5 a month at that time.

Objected to answer also.

Q. Was there any change made in the rates from about April, 1896, by the water company?
A. Yes. There was a change made about that time.

Attorney for complainant objected to question and answer.

Q. I will ask you to state what you paid under the rates charged by the Owensboro Water Company for the month of April, 1896?

Objected to by attorney for complainant.

320 A. I have here a receipt for $24.86.
Q. What did you pay for water rent for the month of June, 1896?

Objected to by attorney for complainant.

A. $13.71.

Q. For the month of July?

Objected to by attorney for complainant.

A. $14.64.

Q. What did you pay for the month of September, 1896?

A. $21.84, with 15 per cent. discount, $3.25, leaving a balance of $18.59.

The attorney for complainant objected to the last question and answer.

Q. What did you pay for the month of October?

A. $15.34 with 12½ per cent. discount, $1.92, leaving $13.42.

Attorney for complainant objected to the question and answer.

Q. For the month of November?

A. $14.65, with 85 cents off, leaving $12.82.

Objected to by attorney for complainant.

Q. For December?

A. $18.37, with 12½ per cent. discount, $2.30, leaving $16.07.

Objected to question and answer.

Q. Did you have a meter attached at your establishment of F. A. Ames & Co.?

A. Yes.

Q. These bills from which you have read here were made out by the Owensboro Water Works Company against F. A. Ames & Co. for an attachment No. 583, and they are signed "Received payment, H. P. Martin, superintendent." Were these bills delivered to you upon payment of your water rent?

Objected to by attorney for complainant.

A. Yes.

Q. On the face of these bills I notice a statement of rates, are these the meter rates that are given on the face of these bills?

Objected to by attorney for complainant.

A. Yes.

Q. I will read from one of these receipts:

2d 30000 gallons per month, or less, per 1000, 30 cents.
2d 30000 gallons per month, or less, per 1000, 30 cents.
3d 30000 gallons per mo., or less, per 1000, 25 cents.
4th 30000 gallons per mo., or less, per 1000, 20 cents.
5th 30000 gallons per mo., or less, per 1000, 15 cents.
321 6th 30000 gallons per mo., or less, per 1000, 14 cents.
7th 30000 gallons per mo., or less, per 1000, 13 cents.
8th 30000 gallons per mo., or less, per 1000, 12 cents.
9th 30000 gallons per mo., or less, per 1000, 11 cents.
10th 30000 gallons per mo., or less, per 1000, 10 cents.
11th 30000 gallons per mo., or less, per 1000, 9 cents.

12th 30000 gallons per mo., or less, per 1000, 8 cents.
13th 30000 gallons per mo., or less, per 1000, 7 cents.
14th 30000 gallons per mo., or less, per 1000, 6 cents.
Any amount in excess of 14,000 gallons per day at 5 cts. per 1000 gallons."

Mr. Ames I will ask you to file as a part of your deposition your water receipt for July 1, 1895; April 1, 1896, and August 1, 1896. Will you do so?

Attorney for complainant objected to the filing of said receipts and to the matter and contents thereof.

A. I file the receipts as a part of my deposition, marking the one for July 1, 1895, "A," with my name written across the back, and the receipt dated April 1, 1896, "B," with my name written across the back; and the receipt dated August 1, 1896, I indorse with my name across the back, and mark it "C," all of them so marked for identication.

NOTICE.—If the water rent is not paid on this service within ten days after it is due, the water will be turned off and not turned on again until all back rents due on this service are paid.

Attachment No. 583.

OWENSBORO, KY., *Aug.* 1, 1896.

Mr. F. A. Ames & Co. to the Owensboro Water Works Co., Dr.

Incorporated.

Meter rent from July 1, 1896, to July 31, 1896..... $14.64

64470 statement of meter July 31, 1896.
58625 statement of meter July 1, 1896.
5842 cubic feet, or 43815 gallons.

1st	30,000	gallons	per mo. or less, per 1,100	35 cts.	.....
2d	"	"	.....	30 cts.	.....
3d	"	"	.....	25 cts.	.....
4th	"	"	....	20 cts.	. .....
5th	"	"	.....	15 cts.	.....
6th	"	"	....	14 cts.	.....

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7th	"	"	.....	13 cts.	.....
8th	"	"	.....	12 cts.	.....
9th	"	"	.....	11 cts.	.....
10th	"	"	.....	10 cts.	.....
11th	"	"	.....	9 cts.	.....
12th	"	"	.....	8 cts.	.....
13th	"	"	.....	7 cts.	.....
14th	"	"	.....	6 cts.	.....

Any amount in excess of 14,000 gallons per day at 5c. per 1,000 galls.

Received payment,

—— ——,
Superintendent.

C. F. A. Ames.

NOTICE.—If the water rent is not paid on this service within ten days after it is due, the water will be turned off and not turned on again until all back rents due on this service are paid.

Attachment No. 583.

OWENSBORO, KY., *Apr.* 1, 1896.

Mr. F. A. Ames & Co. to the Owensboro Water Works Co., Dr.

Incorporated.

Meter rent from Apr. 1, 1896, to Apr. 30, 1896..... $24.86

477794 statement of meter April 30, 1896.
36933 statement of meter April 1, 1896.
10861 cubic feet, or 81457 gallons.

1st	30,000 gallons	per mo. or less, per 1,000.....	35 cts.	10.59
2d	"	"	30 cts.	9.
3d	"	" 21457.....	25 cts.	5.36
4th	"	"	20 cts.	.....
5th	"	"	15 cts.	.....
6th	"	"	14 cts.	.....
7th	"	"	13 cts.	.....
8th	"	"	12 cts.	.....
9th	"	"	11 cts.	.....
10th	"	"	10 cts.	.....
11th	"	"	9 cts.	.....
12th	"	"	8 cts.	.....
13th	"	"	7 cts.	.....
14th	"	"	6 cts.	.....

323 Any amount in excess of 14,000 gallons per day at 5c. per 1,000 galls.

Received payment,

H. P. MARTIN,
Superintendent.

B. F. A. Ames.

NOTICE.—If the water rate is not paid on this service within ten days after it is due, unless the company, at its own option, extends the time, the water will be turned off, and not turned on again until all back rates due on this service are paid.

Attachment No. 583.

OWENSBORO, KY., *July* 1, 1895.

F. A. Ames & Co. to the Owensboro Water Works Co., Dr.

Incorporated.

Water rates, per meter, payable at end of each month.

Minimum per month ..... $
To water used for month ending June 30, 1895. ..... 5.00

Received payment,

H. P. MARTIN, *Supt.*
By MOORMAN.

Permit.

When this bill is receipted by the water company, it becomes a permit to use water for the period specified, from the fixtures and for the purposes assessed, and subject to the rules of the company. It is granted on these conditions and is the duty of the consumer to familiarize himself with said rules.

A. F. A. Ames.

Q. Mr. Ames, have you seen any fires in Owensboro in recent years?

A. Yes.

Q. Have you attended such fires occasionally?

A. Yes.

Q. What has been your observation as to the adequacy of fire protection supplied by the Owensboro Water Works Company?

A. I think it has been inadequate.

324 Attorney for complainant objects to question and answer.

Q. What has seemed to be the trouble?

A. It has been the lack of pressure of force behind the water. Also insufficient water in some cases. Up here at the cellulose fire there was not sufficient water, nor sufficient pressure. The cellulose company did better work with the fire pump they had on their own premises than was done by the city water.

Q. Could you give an idea of how many instances, when you have seen fires here, when there appeared to be an inadequate supply of water, of force behind the water, by the water works company?

A. I don't know that I could off hand. We have not had frequent fires as you know in the last two or three years. There was a fire in a furniture store on Main street, located between St. Ann and

Allen streets, as you will remember, a few years ago—Wolff's store, I think—and there was not sufficient water pressure nor water.

Q. Do you remember anything about the fire at the time of the destruction of Duncan's store, and several buildings in that neighborhood?

A. Very well, and the supply was totally inadequate. It was not Duncan's store. It was the stable opposite that, and some buildings, which was a low building, and the supply of water was totally exhausted apparently.

Q. Do you remember the time when there was a fire down here on St. Ann street, opposite the court house, at a place occupied by Fisher as a drug store?

A. No.

Q. Do you remember the time when Hill's opera house burned on Frederica street?

A. No.

Q. State whether or not there has been complaint generally at the fires here about the inadequacy of water and pressure?

A. A very great deal of complaint about the insufficiency of the service of the water company, as I have described.

Attorney for complainant objected to the question and answer.

Q. Mr. Ames, are you a housekeeper?

A. Yes.

Q. Have you a family?

A. Yes.

Q. Do you live in the city of Owensboro?

A. Yes.

Q. What street do you live on?

325 A. Frederica.

Q. That is one of the principal streets of the city, is it not?

A. Yes, the principal residence street.

Q. What can you say as to the quality of water furnished for domestic use by the Owensboro Water Company?

A. It would be very unsafe to use it without filtering it carefully before using it.

Attorney for complainant objected to question and answer.

Q. I will ask you whether or not it is true that the water during the times when the river is up is unfit for cooking and for ordinary domestic uses, except when it is filtered?

A. Wholly so.

Attorney for complainant objected to question and answer.

Q. Mr. Ames, state what you did, if anything, in the way of establishing your plant with water, when the Owensboro Water Works Company raised its rates?

A. I put in a drive well with a Cook pump.

Q. What did that cost you?

A. About $400, as well as I can remember.

Q. I will ask you this question: Take an ordinary manufacturing establishment, situated here at Owensboro, carriage or wagon factory, or mill, do you think they could afford to pay the rates charged by the Owensboro Water Company at present for water?

A. They could hardly afford it. My rate was $60 a year, or $5 a month. I had only one boiler, I believe a 60 horse power; and I consider that $60 is a high rate, and yet that was increased about 400 per cent. or to about $240.00 or $250.00 a year.

Q. Mr. Ames, I will ask you to state whether the rates for domestic service are high or low, or extremely high. What do you say about that?

A. As compared with other towns of this size, they are extremely high, I would say, more than double. My rate for a small family, myself and wife, and sometimes one or two servants, house of about seven rooms, my rate is $36 a year. It costs me a little more than that.

Q. Does that include sprinkling?

A. Yes.

—. ——.

A. I have the minimum meter rate of $36.00. Sometimes I have paid a little extra.

ATTORNEY FOR COMPLAINANT: "I enter objections to all of the questions and answers of this witness, and especially as to the fire pressure service.

326 The witness was not cross-examined.

"Signature waived."

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF OWENSBORO *et al.*, Defendants.

Affidavit of Charles F. Sturtevant.

The affiant, Charles F. Sturtevant, states that he is a resident of the city of Chicago, State of Illinois, and is a member of the firm of Sturtevant & Todd of Chicago, Ill., consisting of the members, Geo. W. Sturtevant, Jr., C. E. and F. H. Todd, member of the American Society of Civil Engineers, and Charles F. Sturtevant, C. E.; that his profession and that of the other members of the firm is that of civil engineer, engaged in the design and construction of water works, sewerage systems, light and gas plants, and other municipal work; that he has been personally engaged in his profession of 13 years in several of the States of the Union; that previous to entering into the actual work of a civil engineer he *has* graduated in the depart-

ment of civil engineering in the University of Maine, and subsequent to that date was honored by the degree of civil engineer from the same institution; that during the period of his professional work he has been connected with the design and superintendence and construction of 22 systems of water works, and has given his personal supervision to the laying out and construction of said systems; that the said municipal work referred to was in the following States and Territories, to wit: Arizona, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Tennessee, Wisconsin and Ohio.

That he has previous to this date been present in the city of Owensboro, Ky., for a period of four or five days, and at the present time for three or four days, during which period of time he has made a thorough and careful examination of the system of water
327 works owned and operated by the Owensboro Water Works Company, and that he finds the said system comprehends approximately as follows, to wit:

There are laid and constructed from pumping engines number one and two, respectively, 400 feet of 16 inch pipe, suction pipe, and 600 feet of cast iron suction pipe of 20 inch diameter. There are laid in the streets and avenues mostly within the city limits, the following amount of water main pipes:

5600 feet of 12 inch pipe, 300 feet of 10 inch pipe, 10570 feet of eight inch, 60100 feet of 6-inch pipe, 28075 feet of 4-inch pipe, and 1300 feet of 3-inch pipe. And he further states that laying and connecting the said pipes there *was* used approximately 60000 pounds of special castings.

In this system of pipes there *was* placed one 20-inch water grates, two 16-inch, 5 12-inch; two 10-inch, 18 8-inch, 89 6-inch, 60 4-inch, and 3 3-inch valves, making in all 180. On these were placed an equal number of valve boxes, namely, 180. There were set up along the line of water main pipes 162 double discharge fire hydrants, each having 2 ½ inch nozzles.

Affiant also further states that there are in use, and placed at various points along the line of water main pipes, approximately 103 water meters, and approximately 1200 water taps in the city limits, paying revenue to the said water works company, and that there are in use now in the pumping station of the said company three tubular boilers, each 60 inches in diameter by 16 feet long. These boilers have half fronts, and sheet iron connections with the brick smokestack.

Affiant further states that in the engine room are erected two pumping engines. Engine No. 1, the older of the two, was built previous to 1890 by the Buffalo Pump Co., and reconstructed some time after its original installment by the New Albany Pump Co. This engine is rated as having 2,000,000 U. S. gallons per 24 hours. It contains two steam cylinders, one 15 inches and the other 26 inches in diameter. The water cylinders are 14 inches in diameter, all having a stroke of 30 inches. The engine has a 16-inch suction, and a 14-inch discharge; two flywheels 8 feet in diameter. The

said engine is classed as a compound condensing engine. The said engine is supplied with a surface condenser and air-pump. This engine is erected in a pit approximately 35 feet deep below the grade line of the floor, the pit being 12 feet in diameter. The casting of the pit is steel or iron, approximately ¼ inch in thickness. This engine is fitted with the usual attachments, such as gauges, revolution counter, etc.

328 Engine No. 2 was built by the Buffalo Steam Pump Co. of Buffalo, N. Y. This engine has two steam cylinders, one 30 inches, and the other 40 inches in diameter, and two water cylinders, each 16 inches in diameter, and all have a stroke of 36 inches. The engine has Corliss-valve-gear. The suction pipe from this engine is 20 inches in diameter, and the discharge pipe 16 inches. The engine is termed compound, condensing, fly-wheel pattern, and is provided with surface condenser, air-pump, etc. The rated capacity of this engine is said to be 4,000,000 gallons daily. Engine was erected about 1890, in a circular pump pit, about 42 feet deep, and 18 feet in diameter. The wall of the pit is constructed of iron or steel, ⅜ inch in thickness at the bottom, and ⅜ inch at the top. Both pumps are connected to the force mains, and to the battery of boilers. The approximate domestic pressure maintained by the pumping engines is 60 lbs. Fire pressure is said to be from 80 to 125 lbs., and the daily water consumption approximately is 1,000,000 gallons, as an average.

Affiant further states that the pumping station is constructed of brick, and is about 60 feet by 71 feet, outside dimensions.

Affiant says that the cost of the several divisions of the entire water works system is approximately as follows, to wit:

The system of water main, hydrants and valves, meters and taps, estimated at $86,340.00; the power station, $5,500.00; the pumping machinery, $14,400; boilers, $3,100; the lot of ground upon which the pumping station is erected, $1,500.00; the additional lot on Triplett and McFarland streets, owned by the said Owensboro Water Works Company, $1,000.00. This makes a grand total for the original cost of the water works system of $111,840.00.

Affiant further states the present value of the entire water works system is approximately $76,958.00. That the system can be duplicated at the present time for approximately $114,230.00, with all the parts, pipes, engines and boilers, of the system constructed of new material, the machinery to be modern and of the best quality in all details and parts; and that the present prices of nearly all of the material which would enter into the construction of an entirely new plant, are approximately 75 per cent. higher now than the prices were on the same material two years previous to the present time.

Affiant further states that he estimated the annual operating expenses of the said water works plant, including the salary of
329 the superintendent, officers, clerical force, stationery, etc., salary of chief engineer, wages of fireman, expenses for coal, oil, waste and other station supplies to be approximately $6,1000.00.

This item includes the cost of minor repairs in and about the pumping station, but not the expenses of any repairs or extensions outside of the said station.

Affiant further states that he estimates the annual depreciation of the said water works system to be approximately three per cent. of the original cost of the system, and that this arises from the fact that a part of the present system having been constructed since 1878 or 1879, has materially depreciated in value, and necessarily requires more or less repair each year. That the smokestack has materially decreased in value on account of the action of the air and water on the same, resulting in disintegration of the bricks and destruction of the mortar joints. In many places the walls of the power station are ruptured, settlements having occurred in the foundation in several places, causing this result. That part of the north side of the said station has been entirely removed and replaced.

Affiant further states that in reference to the above enumeration of the sizes and amounts of water-main pipes it will be noticed that the proportion of six and four inch pipe is very much in excess of the other sizes; of the six inch pipe there are 60,100 feet, and of the four inch pipe 28,075 feet. That in the city there are frequent long lines of six inch and four inch pipe, having the customary number of fire hydrants. And affiant further says that when a large number of fire streams are necessary for the purpose of extinguishing fires, it is not possible that a proper number of such streams can be furnished through so long lines of six inch and four inch pipe without necessitating such excessive pressure as is not admissible in any system of water mainpipes in use for such purpose; that but two streams at any one time are allowable by ordinance for the use of the fire department along the line or lines of four inch pipe; that but three streams can be used by said department along the line or lines of six inch pipe; that the fire pressure as maintained,at from 80 to 125 pounds, cannot furnish an adequate supply of water along the lines of four and six inch pipe for the number of streams allowable as above stated; that in cities and towns of the size of Owensboro, and especially in the larger towns, it is necessary to have for use by the fire departments, fire engines for the purpose of extinguishing fire; that there are no engine nozzles on any of the said
330 hydrants arranged in the customary way for attaching the fire engines to said hydrants for the purpose of receiving their supply of water from the said system of water main pipes; that it is expected in a city the size of Owensboro, or smaller, that two fires may occur at the same time and in different parts of the city; that it is necessary that the size of water main pipes should be such that an adequate supply for the use of fire engines, or by direct pressure, or from standpipes or reservoir pressure, shall be ample in all cases where the maximum supply of water is desired; that the system of water main pipes in the vicinity of the long lines of four inch and six inch pipes is inadequate for furnishing an abundant supply of water for fire protection, either by direct pressure, applied by the said pumping machinery, or to furnish water to fire-engines, and

applied by the said engines directly under their own pressure. That in the said system of mains, on the four and six inch lines, there are several "dead-ends," which allow no free circulation of water, and unnecessary stagnation thereby results.

Affiant further states that the water supply as furnished by this system of water works to the citizens of Owensboro is drawn directly from the Ohio River without any intervening mode of filtration and purification; and that the Ohio river water is not sufficiently pure for domestic purposes without being so filtered as to remove the impurities contained therein; that approximately on- mile above the intake of the said plant, on the south bank of the Ohio river, are situated two distilleries, each turning the filth and excreta of all kinds directly into the river on the said south bank thereof, and that such filth and impurities, in addition to those thus coming from above, wash by the intake of the said system, all the while tending towards the south bank of the Ohio river; that within approximately 300 feet of the said intake of the said system, and at the foot of Triplett street in said city, there is a sewer outlet, carrying storm water and house sewerage away from a large territory of the city tributory to the said outlet; that the character of the river bank, and the direction of the water lines are such with reference to the main direction of flow of said river, that the sewerage from the said outlet can reach the intake, and become a part of the water supply of the city.

Affiant says, on *the* information and belief, that the water works company has made no extensions or enlargements of its plant, pipe system, etc., during the years 1899 and 1900 to *the* date.

Affiant further says, from his own experience and observa-
331 tion extending over a period of thirteen years, and examination of rates of a large number of cities and towns similarly situated to Owensboro, he is of the opinion that the water rates fixed by ordinance of the city of Owensboro by the common council thereof on March 19, 1900, are reasonable and just, and are not lower than those of many other cities and towns of similar size and under similar condition, and that the considerable reduction of water rates of the smaller water consumers tend- to increase the number of such consumers, and the water consumption.

That the cost of pumping into the mains or storage reservoirs for delivery to water consumers has been shown in many cities and towns of the size of Owensboro and larger, to be approximately $15.50 per million gallons, or approximately 1½ cents per thousand gallons.

Affiant further says that the statements contained in the foregoing affidavit are true as he verily believes.

Sworn to before me by the affiant, Charles F. Sturtevant, this the 9th day of April, A. D. 1900.

——.

STATE OF KENTUCKY, } sct:
County of Daviess, }

I, Charles E. McGill, an examiner in and for the county and State aforesaid, hereby certify that the foregoing depositions of Charles F. Sturtevant, James P. Wigal, Robert A. Cummings, C. W. Bransford, Charles Broeker, Charles Haney, E. B. Shifley and F. A. Ames were taken before me at the time, place and for the purpose stated in the captions to said depositions; that the said witnesses were each duly sworn by me before testifying; that there was present during the taking of said depositions, Mr. Charles Finn, representing the complainant; also Mr. W. W. Davies, and that the defendants were represented by Mr. Geo. W. Jolly, attorney for the City of Owensboro; that by consent of parties signature to said depositions was waived.

Given under my hand as examiner aforesaid, this December 26, 1900.

(Signed) CHARLES E. McGILL, *Ex. D. C.*

On the back of said depositions and exhibits and notice filed therewith is the following indorsement, to wit: Filed December 28th, 1900. Thomas Speed, clerk. By Dudley Lindsely, D. C.

332 And on another day, to wit, on the 4th day of January, 1901, there was filed in said clerk's office of the circuit court of the United States, at Owensboro, Kentucky, the deposition of Asa Williams, taken in rebuttal on behalf of the complainant, which was of the following words and figures, to wit:

United States Circuit Court for the District of Kentucky, Sixth Circuit, Owensboro Division.

OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF OWENSBORO, ETC., Defendants. } Notice.

The City of Owensboro will take notice that on December 18, 1900, the plaintiff will take the deposition of Asa Williams, in rebuttal here, at the office of the clerk in the United States court room in Owensboro, Kentucky, the place where all other depositions in this action have been taken.

(Signed) BINGHAM & DAVIES, ETC.,
Att'ys for Complainant.

Endorsed: Executed on the City of Owensboro, Ky., by delivering to W. P. Small, mayor of said city, a true copy of the within Dec. 17, 1900. J. W. Jones, S. D. C. By J. J. Wood, D. S.

United States Circuit Court for the Sixth Circuit and District of Kentucky, Owensboro Division.

THE OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF OWENSBORO ET AL., Defendants.

Deposition in Rebuttal.

333 The deposition of Asa Williams, taken, pursuant to notice hereto attached, at the law office of George W. Jolly, on the 18th day of December, 1900, to be read as evidence in rebuttal on behalf of the complainant, The Owensboro Water Works Company.

Examined by Mr. W. W. DAVIES, attorney for complainant:

The witness being first duly sworn deposed as follows:

Q. State your age, residence and occupation?

A. Age 35 years; occupation engineer of the Owensboro Water Works Company, at Owensboro, Ky.; residence Owensboro, Ky.

Q. Are you the same Asa Williams who gave his deposition in chief in this case?

A. Yes.

Q. Mr. Williams, do you remember the night of the fire in July at the cellulose plant here?

A. Yes.

Q. Was that the fire about which the witness have been testifying to-day and yesterday?

A. Yes. Mr. Haney did.

Q. Were you at the engine house of the water company that night?

A. I got there a few minutes after the alarm was sounded.

Q. Did you see the register as to the pressure there?

A. Yes.

Q. Did you observe it at all times during the fire?

A. Yes.

Q. What was it?

A. Never less than 100 pounds, and varied from that to 115 pounds.

Q. Was that during the entire fire?

A. Yes, until I asked them if I could reduce the pressure some, possibly half after eleven o'clock, when I dropped it down to about 90 pounds.

Q. Did you have your attention called the next day, or very soon thereafter, to what that pressure was?

A. About the time I sent down there to find out about letting the pressure down my attention was called to it.

Q. Do you remember clearly what that pressure was during the entire fire?

A. Yes, I remember it clearly, and so stated it in my report, daily report.

Q. What is the usual necessary fire pressure in this town?

334 A. We run all the way from 80 to 140 pounds. We have had 140 pounds.

Q. Did anybody call for more pressure the night of the fire, Mr. Williams?

A. No.

Q. Did any message come to you about it at all?

A. No.

Q. Were you there in full charge?

A. Yes.

Q. Did you notice or know of any defect in the plug, or pipe line down near the cellulose plant the next day or thereafter?

A. The morning after the fire I went down to the corner of Main and Clay to examine the hydrant, and found out that in opening it, just after it passed the 4th or 4½ turns, it pulled extremely hard for about three-fourths of a turn, in fact, it pulled so extremely hard that a person would suppose that the hydrant was wide open. James Alford was there filling a sewer ditch. I spoke to him about it, and he said he had noticed that a few days before and had started to report the matter to me. I took the inside of the hydrant up. On the stem inside of the hydrant there is a cap that prevents it from dropping down on the screw. In screwing the screw out it goes down through this cap, and there was a shoulder that had become worn on the hydrant stem, or rather, screw, so when it caught on that it required considerable force to force it down.

Q. Was that hydrant turned on to its full capacity the night of the fire?

A. I don't think it was. I could not say.

Q. I mean in the morning when you looked at it?

A. It was not in operation when I looked at it in the morning.

Q. Was it turned four, five, six, ten or any number of revolutions when you looked at it?

A. It was closed because it had not been placed in operation that morning.

Q. But you say there was a difficult place in turning it?

A. Yes, right after the fourth turn.

Q. Were you told by anyone afterwards, representing the fire department of the city that it was only turned something over four turns?

Objected to by attorney for defendants.

A. Yes.

Q. Who told you about that?

A. Mr. Conyers.

335 Q. What connection did he have with the city?

A. He is captain of one of the hose houses in the city fire department.

Q. If the hydrant had been turned on to its full capacity how many turns would have been necessary to make it so?

A. 16.

Q. If it had been on to full capacity would it have thrown the water to wherever necessary in that building?

A. Yes.

Q. Have you tested the fire stream from the pressure of that water company on any of the buildings in Owensboro at any time?

A. Yes, at various times.

Q. When?

A. I think about five years ago was when I made the first tests. I got a hose and nozzle, and equipped the nozzle so I could put a gauge on it, and also had a gauge on the hydrant. My principal idea in this was to get the hose friction, also that in the hydrant, and taking the pressure at the pumping station, hydrant, and nozzle, I could find the loss. I tested nearly all over town.

Q. What is one of the highest buildings in Owensboro?

A. I guess the Rudd house.

Q. How about the courthouse?

A. I think they are both about the same.

Q. Have you recently tested the fire stream on the court house as to its height?

A. Yes, this afternoon.

Q. Did you throw water to the top of the courthouse?

A. With the big line of hose it threw water up to the face of the clock above the court house roof. And with the other hose we threw water up to the top of the building proper.

Q. Is the clock above the court house roof?

A. Yes, some 20 feet, I guess.

Q. How many streams did you have running?

A. We had two from this corner, one inch, and one inch and eight, and an inch and three-fourths, and an inch and a half from the other corner.

Q. Was any complaint made to you by the city's fire department at the time of the cellulose fire about the singing of that plug?

A. No.

Q. You did not hear about that?

A. No fireman told me about it.

Q. Who told you about it?

336 A. One or two outside parties spoke to me about it.

Q. What was the amount of hose pipe that they used there at the cellulose fire?

A. Mr. Haney stated that there was 500 feet on each line of hose, or close to it.

Q. Was that more than necessary to reach from the plugs to the fire?

A. Yes, the building from the hydrant is about 270 feet I think,

and I suppose the building was about 100 feet wide, making about 370 feet.

Q. Does extra hose cause extra friction?

A. Yes, every fifty feet of hose, depending on the pressure it is operating at, takes up certain amount of the pressure by friction.

Q. Does extra friction diminish the height and force of the water stream?

A. Yes.

Q. About how much extra hose was used there if 500 feet was used?

A. I should judge that from 100 to 150 feet at least was used.

Q. Well, say 150 feet more hose than was necessary was used, that would decrease the pressure how much?

A. According to the amount of water discharged that night, and the amount of pressure they were operating under, and consulting the tables of competent authorities, it would amount to about twenty or twenty-five pounds, to each line of hose, if the hose were straight. The tables are computed on straight rubber hose and smooth, otherwise the friction would be increased.

Q. Will a one inch nozzle with the pressure you had on that night give as good fire service as a larger nozzle?

A. No.

Q. Why?

A. In a fire of great magnitude, in throwing a small stream against it, the claim is made by competent authority that this water is converted into steam, and the combination forms a gas, which instead of reducing the fire only aggravates it.

Q. Who has control of and is responsible for the hose, the water company or the fire department.

A. The fire department.

Q. Would the water service have been more efficient had they had a larger nozzle?

A. I think it would in a fire of that magnitude.

Q. Will an engine, running at a pressure of 110 for instance throw the same stream of water from the ground to a given point that it would throw from a window, say half way up from the ground to that point?

337 A. Throw it to the same point, yes.

Q. Does carrying it up to window help it any?

A. No.

Q. If it will throw it from a window to a given point, it will do so from the ground?

A. Yes.

Q. Have you prepared a statement in regard to this question of fire pressure within the last day or two?

A. Yes.

Q. Have you got it with you?

A. Yes.

Q. Do you remember the fire at the stable opposite Duncan's store—Miller's stable?

A. Yes.

Q. About how long — was that?

A. That must have been 12 or 13 years ago.

Q. Was that before you got the engines that you used at the cellulose fire?

A. Yes. I was working for the electric light people then.

Q. At the time of that fire you did not have the present equipment?

A. No.

Q. Did you have the equipment you had at the cellu-ose fire?

A. No.

Q. Since you have had this equipment that you had at the cellulose fire, and have now, have you had any big fires in Owensboro except the cellulose fire?

A. Yes, several pretty big fires.

Q. What was the biggest one besides the cellulose fire?

A. The last Rudd House fire in 1890.

Q. Was there any complaint about the efficiency of the water then?

A. No. We threw seven streams then.

Q. Do you remember the fire on Main street at the furniture store near Head's drug store?

A. Yes.

Q. Was there anything the matter that night?

A. Not a thing. They kicked about the pressure that night. We knocked the window lights out of the third story with it.

Q. Was the kick on account of the excessive pressure?

A. Yes. I went down there after the fire had progressed a while, and you could hear them hollering from up stairs, "Turn it off."

They could not get the ladder up to the third story window,
338 and they had gone up stairs with a line of hose. When they got up to the second story windows, they threw the water out, tearing sash, windows and everything before it, and everything had to get out of the way.

Objected to by the attorney for defendants.

Q. Did the stream of water reach to the top window?

A. Yes.

Q. Did you get to any parts of the building wherever necessary?

A. Yes. The fire got back in the roof in what is called the attic. He had set this afire away back in there. If you threw the water in the top windows it would not reach the fire and you had to carry the hose in to get at the fire.

Q. How long, Mr. Williams, have you been connected with the work in connection with fire pressure, and matters of that kind?

A. I used to run with the old volunteer machinery in Evansville and was a kind of volunteer here until they got a paid department. When I was at the electric light station I generally attended all the fires.

Q. Does this department of knowledge come under your work in your capacity as the engineer of the water company?

A. Oh, yes, it concerns hydraulics, and all those things, you know. A man should understand all those to be a practical water works man.

Q. I will ask you now, supposing from your knowledge of fire pressure that the plug at the cellulose fire had been wide open, and that the hose were not in excess of the amount required and the nozzle had been larger, so as to prevent the spraying of water, would there have been any difficulty whatever with the stream under your pressure?

A. No.

Q. Have you ever noticed any difference in the pressure at the Clay Street plug and the Bolivar Street plug?

A. Shortly after this controversy, I equipped an arrangement of my own. I took a nozzle cap, or an old hose butt, and had it fitted up so I could put a two inch opening on the hydrant, and I took *and* gauge and adjusted it with the gauge at the pumping station, and I applied this device to the two hydrants so as to really get the actual friction loss, and see whether it corresponded with the tables and figures I had prepared. I think I found a discrepancy of about two pounds on the Clay Street hydrant over what the figures were, and a difference of about a pound on the Bolivar Street
339 hydrant. When I did this I had the pipe shut off that comes across Bolivar street from Third, but with this pipe open the difference was about the same. The difference in elevation between the pumping station and these hydrants had to be taken into consideration, which I think would have made a difference of four pounds, the pumping station being lower than these points.

Q. What was the nature of the complaint, if any, of the fire pressure at the furniture store on Main street, that it was a too little or too strong?

A. Mr. Yager, at the time, spoke of the pressure being excessive. That they were not able to hold it.

Q. Who is he?

A. He was the fire chief at that time.

Q. The city's fire chief?

A. Yes.

Q. Did you hear him speak about it?

A. Yes, he spoke to me about it.

"The witness was not cross-examined."

"Signature waived."

STATE OF KENTUCKY, }
County of Daviess, } *sct:*

I, Charles E. McGill, an examiner in and for the county and State aforesaid, do hereby certify that the foregoing deposition of Asa Williams was taken before me at the time, place, manner and for

the purpose stated in the caption; that said witness was first duly sworn by me before testifying; that the complainant, The Owensboro Water Works Company was *only* represented by attorney; also the defendants, City of Owensboro, *et al.*, were represented *only* by attorney; that by consent of attorneys signature to said deposition was waived.

Given under my hand as examiner aforesaid, this December 26, 1900.

(Signed) CHARLES E. McGILL, *Ex. D. C.*

On the back of said deposition and notice filed herewith is the following indorsement, to wit: Filed Jan. 4, 1901. Thomas Speed, clerk. By Dudley Lindsey, D. C.

And on another day, to wit, on the 28th day of January, 1901, at the January term of the circuit court of the United States for the sixth circuit and district of Kentucky, Owensboro division,
340 at a regular term begun and held at the Federal Court hall in the city of Owensboro, the following proceedings were had, to wit:

OWENSBORO WATER WORKS COMPANY
vs.
THE CITY OF OWENSBORO.

This day came the parties by their counsel and on their motion, it is ordered that the depositions of both sides taken herein be opened by the clerk and published.

The defendant tendered and moved to file seven documents marked respectively A, B, C, D, E, F & G, certified by the auditor and secretary of state of the State of Kentucky to be read as evidence on behalf of the defendant and the court sustained said motion and ordered same to be filed.

Said seven documents referred to above as marked A, B, C, D, E, F & G, respectively, are of the following words and figures, to wit:

COMMONWEALTH OF KENTUCKY, *ss:*

I, G. G. Coulter, auditor for the Commonwealth of Kentucky, do certify that the foregoing seven (7) pages hereto attached marked respectively A, B, C, D, E, F & G, are true copies of original reports now on file in my office for the years 1892, 1893, 1894, 1895, 1896, 1897 and 1898, respectively, made by the Owensboro Water Works Company to the auditor of the Commonwealth of Kentucky, as required by article III of chapter 103 of an act entitled "An act relating to revenue and taxation," which became a law November 11, 1892, and that I am the custodian and keeper of said original reports so made as aforesaid.

Given under my hand and seal of said office at my office in the city of Frankfort, this 11th day of January, A. D. 1901.

[Auditor's Seal.]

(Signed) GUS G. COULTER, *Auditor.*

COMMONWEALTH OF KENTUCKY, *ss:*

I, C. B. Hill, secretary of state of the Commonwealth of Kentucky, do certify that the foregoing certificate and attestation of
341 G. G. Coulter, the auditor of the Commonwealth of Kentucky, certifying that seven documents thereto attached are true copies of the original reports on file in his office, is in due form and made by the proper officer.

Given under my hand as secretary of state as aforesaid and the seal of the Commonwealth of Kentucky, at my office in the city of Frankfort, this 11th day of January, 1901.

[Seal of Commonwealth of Kentucky.]

C. B. HILL,
Sec'y of State.

Report

G.

of the

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to the

Auditor of public accounts of Kentucky,

September 15, 1898.

Article III.

Assessment of Certain Corporations.

SECTION 1. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas c mpany, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the auditor, treasurer and secretary of state, who are hereby constituted
342 a board of valuation and assessment for said purpose, and for

the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

SEC. 2. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 16 of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent in such form as the auditor may prescribe, showing the following facts, viz:

* * * * * * *

Name of corporation, Owensboro Water Works Co.

Name the principal place of business of the corporation, company or association you represent. Owensboro, Kentucky.

Give the name and official position of the officer making this report.

Name, D. Long Miller; position, president.

The kind of business in which the said corporation, company or association is engaged. Operation of a system of water works.

The amount of capital stock, preferred and common, of the said corporation, company or association as of date September 15, 1898.

Preferred, none; common, 355000.00.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, of September 15, 190–.

Preferred, none; common, 3550.00.

Amount of capital stock, as above, paid up, $355000.00.

Par value of the preferred stock, as above, $—.

Par value of the common stock, as above, $100.00.

Real value of the stock, as above. Preferred, $—; common, $ no value.

Highest price at which the stock above mentioned was sold at a *bona fide* sale within twelve months next before September 15, 1898.

$— No sales. per share.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 1898.

343 Surplus fund, $—; undivided profits, $ none; value of all other assets, nine bonds at $690.00—$6210.

State total amount of indebtedness, as principal, of the said corporation, company or association on September 15, 1898.

Bonded indebtedness, $237000.00; rate of interest paid, 5 per cent.

Other indebtedness, $20000.00; amount of interest paid, $11900.

Total indebtedness, $257000.00.

State separately the total amount of gross and net earnings, or in-

come of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before September 15, 1898.

Gross earnings or income			$26598 99
Less expenses,			
Salaries	$.....		
Wages	$ 6210 20		
Interest	$11900 00		
Dividends	$.....		
Enlargement of plant	$.....		
Other expenses	$12321 10	Total,	$30431 30
Deficit			$3832 31

Amount and kind of tangible property in this State owned by the said corporation, company or association, on September 15, 1898.

Amount of tangible property, $765.00.

Kind of tangible property. Pipe system, pumping station, machinery for pumping station, tools, hydrants, lot on which pumping station is located, a vacant lot on corner McFarland and Triplett streets, and about 3 acres of land in Daviess Co.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County, Daviess; city, Owensboro, Ky.; town, ——; number or name of taxing district or precinct ——.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$76500.00.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association. ——.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and taxing district in this State. (Give the length of line in each county, city, town or taxing district separately.)

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Also, the total length of the entire line or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this State. ——.

State the entire gross and net income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 15, 1898.

Gross income, $26598.99; deficit, $3832.31.

State the entire gross and net income or earnings received by the said corporation, company or association, on business done in this State and elsewhere for the same length of time.

Gross income, $—; net income or earnings, $—.

THE OWENSBORO WATER WORKS CO.,
By D. LONG MILLER.

COMMONWEALTH OF KENTUCKY, *Jefferson County,* } ss:

This day personally appeared before the undersigned, a notary public in and for the State and county aforesaid, D. Long Miller, whose signature is attacher thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this 30th day of September, 1898.

WM. SACKETT,
Notary Public, Jeff. Co., Ky.

A copy attest:
W. F. GRAYOT,
Ass't Auditor.

345 Form A–8. Report of —— Located at —— for Sept. 15th, 1898. Received ——, 190–.

Form A–8. 9–3–2000

Report

F.

of the

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to the

Auditor of public accounts of Kentucky,

September 15, 1897.

Article III.

Assessment of Certain Corporations.

SECTION 1. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other

like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the auditor, treasurer and secretary of state, who are hereby constituted a board of valuation and assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

SEC. 2. In order to determine the value of the franchises
346 mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 16 of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz:

* * * * * * *

Name of corporation, Owensboro Water Works Co.

Name the principal place of business of the corporation, company or association you represent. Owensboro, Kentucky.

Give the name and official position of the officer making this report.

Name J. W. Holmes; position, vice-president.

The kind of business in which the said corporation, company or association is engaged. The operation of a system of water works.

The amount of capital stock, preferred and common, of the said corporation, company or association as of date September 15, 1897.

Preferred, none; common, 355000.00.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, on September 15, 1897.

Preferred, none; common, 3550.

Amount of capital stock, as above, paid up, $355000.00.

Par value of the preferred stock, as above, $—.

Par value of the common stock, as above, $100.00.

Real value of the stock, as above. Preferred, $—; common, $ no value.

Highest price at which the stock above mentioned was sold at a *bona fide* sale within twelve months next before September 15, 1897.

$— per share. No market for same.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 1897.

Surplus fund, none; undivided profits, none; value of all other assets, none.

State total amount of indebtedness, as principal, of the said corporation, company or association on September 15, 1897.

Bonded indebtedness, $238000.00; rate of interest paid, 6 per cent.

347 Other indebtedness, $3000.00; amount of interest paid, $14280.00.

Total indebtedness, $241000.00.

State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before September 17, 1897.

Gross earnings or income			$22621 20
Less expenses,			
Salaries	$.....		
Wages	$ 4208 20		
Interest	$14280 20		
Dividends	$.....		
Enlargement of plant	$ 125 72		
Other expenses	$10275 08	Total,	288889 00
Deficit			$6267 80

Amount and kind of tangible property in this State owned by the said corporation, company or association, on September 15, 1897.

Amount of tangible property, $75000.00.

Kind of tangible property. Pipe system, pumping station, machinery for pumping station, tools, hydrants, lot on which pumping station is located and vacant lot on corner of McFarland and Triplett streets, and about 3 acres of land in Daviess Co.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County ——; city ——; town ——; number or name of taxing district or precinct ——.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$75000.00.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association. ——.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and

taxing district in this State. (Give the length of line in each county, city, town or taxing district separately.)

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Also, the total length of the entire line or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this State.....

State the entire gross and net income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 15, 1897.

Gross income, $22621.20; deficit or loss, $6267.80.

State the entire gross and net income or earnings received by the said corporation, company or association, on business done in this State and elsewhere for the same length of time.

Gross income, $—; net income or earnings, $—.

J. W. HOLMES,
Vice-President.

COMMONWEALTH OF KENTUCKY, *Jefferson County,* } ss:

This day personally appeared before the undersigned, a notary in and for the State and county aforesaid, J. W. Holmes, whose signature is attached thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this 3rd day of February, 1898.

WM. SACKETT,
N. P., Jeff. Co., Ky.

A copy attest:

W. F. GRAYOT,
Ass't Auditor.

Form A–8. Report of —— —— Located at —— for Sept. 15th, 1897. Received —— — 190–.

349 Form A–8. 9–3–2000.

Report

of the E.

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to the

Auditor of public accounts of Kentucky,

September 15, 1896.

Article III.

Assessment of Certain Corporations.

SECTION 1. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places where such local taxes are to be paid and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the auditor, treasurer and secretary of state, who are hereby constituted a board of valuation and assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

SEC. 2. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as
350 hereinafter required by section 16 of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary,

treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.:

* * * * * * *

Name of corporation, Owensboro Water Works Co.

Name of the principal place of business of the corporation, company or association you represent. Owensboro, Kentucky.

Give the name and official position of the officer making this report.

Name, A. F. Callahan; position, president.

The kind of business in which the said corporation, company or association is engaged. The operation of a system of water works at Owensboro, Kentucky.

The amount of capital stock, preferred and common, of the said corporation, company or association as of date September 15, 1896.

Preferred, none; common, 355000.00.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, on September 15, 1896.

Preferred, none; common, 3550.00.

Amount of capital stock, as above, paid up, $355000.00.

Par value of the preferred stock, as above, $—.

Par value of the common stock, as above, $100 per share.

Real value of the stock, as above. Preferred, none; common, nothing.

Highest price at which the stock above mentioned was sold at a *bona fide* sale within twelve months next before September 15, 1896.

$— per share. None sold.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 1896.

Surplus fund, $—; undivided profits, $—; value of all other assets, $—.

State total amount of indebtedness, as principal, of the said corporation, company or association on September 15, 1896.

Bonded indebtedness, $239000.00; rate of interest paid, six per cent.

Other indebtedness, $5890.55; amount of interest paid, $14,859.87.

351 Total indebtedness, $244890.55.

State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before September 15, 1896.

Gross earnings or income			$28,267 49
Less expenses,			
Salaries	$		
Wages	$ 4878	20	
Interest	$14859	87	
Dividends	$		
Enlargement of plant	$ 2493	00	
Other expenses	$ 9628	99	Total, $31860 06
Deficit			$3592 57

Amount and kind of tangible property in this State owned by the said corporation, company or association, on September 15, 1896.

Amount of tangible property, $—

Kind of tangible property. Pumping station, pumping machinery, tools, pipe system, hydrants, lot on which pumping station is situated, vacant lot on corner of McFarland and Triplett streets, and about 3 acres of ground in Daviess Co.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County, Daviess; city, Owensboro; town ——; number or name of taxing district or precinct ——.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$75000.00.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and taxing district in this State. (Give the length of line in each county, city, town or taxing district separately.)

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Also the total length of the entire line or lines, as above operated, owned, leased or controlled, as above, elsewhere than in this State

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State the entire gross and net income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 15, 190–

Gross income, $—; net income or earnings, $—

State the entire gross and net income or earnings received by the

said corporation, company or association, on business done in this State and elsewhere for the same length of time.

Gross income, $—; net income or earnings, $—

OWENSBORO WATER WORK- CO.,
By A. F. CALLAHAN, *President.*

COMMONWEALTH OF KENTUCKY, }
Jefferson County, } ss:

This day personally appeared before the undersigned, a notary public in and for the State and county aforesaid, A. F. Callahan, whose signature is attached thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this 17 day of March, 1897.

WM. SACKETT,
N. P., Jeff. Co., Ky.

A copy attest:
W. F. GRAYOT,
Ass't Auditor.

Form A–8. Report of —— ——. Located at —— for Sept. 15th, 1896. Received —— — 190–.

353 Form A–8. 9–3–2000.

Report

of the D.

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to the

Auditor of public accounts of Kentucky,

September 15, 1895.

Article III.

Assessment of Certain Corporations.

SECTION 1. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other cor-

poration, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the auditor, treasurer and secretary of state, who are hereby constituted a board of valuation and assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

SEC. 2. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed
354 as hereinafter required by section 16 of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.:

* * * * * * *

Name of corporation, Owensboro Water Works Co.

Name the principal place of business of the corporation, company or association you represent. Owensboro, Kentucky.

Give the name and official position of the officer making this report.

Name A. F. Callahan; position, president.

The kind of business in which the said corporation, company or association is engaged. The operation of a system of water works, at Owensboro, Ky.

The amount of capital stock, preferred and common, of the said corporation, company or association as of date September 15, 1895.

Preferred, none; common, 355000.00.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, on September 15, 190–

Preferred, none; common, 3550.

Amount of capital stock, as above, paid up, $355000.

Par value of the preferred stock, as above, $—.

Par value of the common stock, as above, $100 per share.

Real value of the stock, as above. Preferred, none; common, nothing.

Highest price at which the stock above mentioned was sold at a *bona fide* sale within twelve months next before September 15, 1895.

$— per share. None sold.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 1895.

Surplus fund, $—; undivided profits, $—; value of all other assets, $—.

State total amount of indebtedness, as principal, of the said corporation, company or association on September 15, 1895.

Bonded indebtedness, $241000.00; rate of interest paid — per cent.

Other indebtedness, $5448.94; amount of interest paid, $—.

Total indebtedness, $246448.94.

355 State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before September 15, 1895.

Gross earnings or income			$22159 93
Less expenses,			
Salaries	$		
Wages	$		
Interest	$		
Dividends	$		
Enlargement of plant	$		
Other expenses	$	Total, $	
Net income			$

$22159.93 from all sources except hydrant rentals from city, $6964.87. This hydrant rental is pledged to bondholders and paid direct to trustee of bonds.

Amount and kind of tangible property in this State owned by the said corporation, company or association, on September 15, 1895.

Amount of tangible property, $—.

Kind of tangible property. Pumping stations, pumping machinery, tools, pipe system, hydrants, lot on which pumping station is situated, vacant lot on corner of McFarland and Triplett streets, and about three acres of ground in Daviess county.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County, Daviess; city, Owensboro; town ——, number or name of taxing district or precinct ——.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$75000.00.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and

taxing district in this State. (Give the length of line in each county, city, town or taxing district separately.)

356 .....
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Actual am't received from bonds, $190000.00.
Deficit last year, $1883.25.
Never has paid any dividend.
No salaries paid except $100 per month to sup't, and $20 to sec't'y.

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Also, the total length of the entire line or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this State —.

State the entire gross and net income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 15, 190–

Gross income, $—; net income or earnings, $—.

State the entire gross and net income or earnings received by the said corporation, company or association, on business done in this State and elsewhere for the same length of time.

Gross income, $—; net income or earnings, $—.

OWENSBORO WATER WORKS CO.,
By A. F. CALLAHAN, *President.*

COMMONWEALTH OF KENTUCKY, }
Jefferson County, } *ss:*

This day personally appeared before the undersigned, a notary public in and for the State and county aforesaid, A. F. Callahan, whose signature is attached thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this 7th day of November, 1895.

WM. SACKETT,
N. P., Jeff. Co., Ky.

A copy attest:

W. F. GRAYOT,
Ass't Auditor.

Form A–S. Report of —— —— Located at —— for Sept. 15th 1895. Received —— — 190–

357 Form A–S 9–3–2000

Report

C.

of the

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to the

Auditor of public accounts of Kentucky,

September 15, 1894.

Article III.

Assessment of Certain Corporations.

SECTION 1. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the auditor, treasurer and secretary of state, who are hereby constituted a board of valuation and assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

SEC. 2. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 16 of this article, shall annually, be-
358 tween the fifteenth day of September and the first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary,

treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.:

* * * * * * *

Name of corporation, Owensboro Water Works Co.

Name the principal place of business of the corporation, company or association you represent. Owensboro, Kentucky.

Give the name and official position of the officer making this report.

Name, A. F. Callahan; position, president.

The kind of business in which the said corporation, company or association is engaged. The operation of a system of water works at Owensboro, Kentucky.

The amount of capital stock, preferred and common, of the said corporation, company or association, as of date September 15, 1894.

Preferred, none; common, 355000.00.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, on September 15, 1894.

Preferred, none; common, 3550.

Amount of capital stock, as above, paid up, $355,000.

Par value of the preferred stock, as above, $—.

Par value of the common stock, as above, $100 per share.

Real value of the stock, as above. Preferred, $ none; common $ nothing.

Highest price at which the stock above mentioned was sold at a *bona fide* sale within twelve months next before September 15, 1894.

$— per share. None sold.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 1894.

Surplus fund, $—; undivided profits, $—; value of all other assets, $—.

State the total amount of indebtedness, as principal, of the said corporation, company or association, on September 15, 1894.

Bonded indebtedness, $219000.00.

Other indebtedness, $26058.53.

Total indebtedness, $245058.53.

359 State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before September 15, 190–.

Gross earnings or income.....

Less expenses,

Salaries.....	$.....	
Wages.....	$.....	
Interest.....	$.....	
Dividends	$.....	
Enlargement of plant.....	$.....	
Other expenses.....	$.....	Total, $.....

Net income..... $.....

$20,936.14 from all sources except hydrant rental from city, $6840. This hydrant rental is pledged to bondholders and paid direct to trustee of bonds.

Amount and kind of tangible property in this State owned by the said corporation, company or association, on September 15, 1894.

Amount of tangible property, $—.

Kind of tangible property. Pumping station, pumping machinery, tools, pipe system, hydrants, lot on which pumping station is situated, a vacant lot on corner McFarland and Triplett streets, and about three acres of ground in Daviess Co.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County, Daviess; city, Owensboro; town, ——; number or name of taxing district or precinct, ——.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$75000.00.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and taxing district in this State. (Give the length of line in each county, city, town or taxing district separately.)

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Also, the total length of the entire line or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this State .....

State the entire gross and net income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 15, 190–.

Gross income, $—; net income or earnings, $—.

State the entire gross and net income or earnings received by the said corporation, company or association, on business done in this State and elsewhere for the same length of time.

Gross income, $—; net income or earnings, $—.

OWENSBORO WATER WORKS COMPANY,
By A. F. CALLAHAN, *Vice-Pres't.*

COMMONWEALTH OF KENTUCKY, }
Jefferson County, } *ss:*

This day personally appeared before the undersigned, a notary public in and for the State and county aforesaid, A. F. Callahan, whose signature is attached thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this 7th day of November, 1894.

WM. SACKETT,
Notary Public, Jeff. Co., Ky.

A copy attest:
W. F. GRAYOT,
Ass't Auditor.

Form A–8. Report of —— —— Located at —— for Sept. 15th, 1894. Received —— — 190–.

361 Form A–8. 9–3–2000.

Report

B.

of the

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to the

Auditor of public accounts of Kentucky,

September 15, 1893.

Article III.

Assessment of Certain Corporations.

SECTION 1. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may

be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the auditor, treasurer and secretary of state, who are hereby constituted a board of valuation and assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

SEC. 2. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 16 of this article, shall annually
362 between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz:

* * * * * * *

Name of corporation, Owensboro Waterworks Co.

Name the principal place of business of the corporation, company or association you represent. Owensboro, Ky.

Give the name and official position of the officer making this report.

Name, A. F. Callahan; position, treasurer.

The kind of business in which the said corporation, company or association is engaged.

Supplying water to city of Owensboro and citizens of Owensboro.

The amount of capital stock, preferred and common, of the said corporation, company or association, as of date September 15, 1893.

Preferred, none; common, 355000.00.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, on September 15, 1893.

Preferred, none; common, 3550.

Amount of capital stock, as above, paid up, $355000.00.

Par value of preferred stock, as above, $—.

Par value of common stock, as above, $100 per share.

Real value of the stock, as above. Preferred, $ none; common, $ nothing.

Highest price at which the stock above mentioned was sold at a *bona fide* sale within twelve months next before September 15, 1893.

$— per share. None sold.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 1893.

Surplus fund, $—; undivided profits, $—; value of all other assets, $—.

State the total amount of indebtedness, as principal, of the said corporation, company or association, on September 1893.

Bonded indebtedness, $215000.00; rate of interest paid — per cent.

Other indebtedness, $21031.39; amount of interest paid, $—.

363 Total indebtedness, $236031.39.

State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before September 15, 1893.

Gross earnings or income .....

Less expenses,

Salaries.....	$.....	
Wages.....	$.....	
Interest.....	$.....	
Dividends.....	$.....	
Enlargement of plant.....	$.....	
Other expenses.....	$.....	Total, $.....

Net income ..... $.....

(Not in blank for '93.)

$19,568.50 from all sources except hydrant rental from city, $6760. This hydrant rental is pledged to bondholders and paid direct to trustee of bonds.

Amount and kind of tangible property in this State owned by the said corporation, company or association, on September 15, 1893.

Amount of tangible property, $—.

Kind of tangible property. Pumping station, pumping machinery, tools, pipe system, hydrants, lot on corner McFarland and Triplett streets, and about three acres of ground in Daviess county.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County, Davies; city, Owensboro; town ——; number or name of taxing district or precinct ——.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$75000.00.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association. ——.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and taxing district in this State. (Give the length of line in each county, city, town or taxing district separately.)

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Also, the total length of the entire line or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this State ——.

State the entire gross and net income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 15, 190–.

Gross income, $—; net income or earnings, $—.

State the entire gross and net income or earnings received by the said corporation, company or association, on business done in this State and elsewhere for the same length of time.

Gross income, $—; net income or earnings, $—.

OWENSBORO WATER WORKS COMPANY,
By A. F. CALLAHAN, *Treas.*

COMMONWEALTH OF KENTUCKY, *Jefferson County,* } *ss:*

This day personally appeared before the undersigned, a notary public in and for the State and county aforesaid, A. F. Callahan, whose signature is attached thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this 28th day of November, 1893.

WM. SACKETT,
Notary Public.

A copy attest:
W. F. GRAYOT,
Ass't Auditor.

Form A–8. Report of —— Located at —— for Sept. 15th, 1893. Received ——, 190–.

365 Form A–8. 9–3–2000

Report

A.

of the

Owensboro Water Works Co.

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to the

Auditor of public accounts of Kentucky,

November 15, 1892.

Article III.

Assessment of Certain Corporations.

SECTION 1. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the auditor, treasurer and secretary of state, who are hereby constituted a board of valuation and assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

SEC. 2. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, ex-
366 cept banks and trust companies, whose statements shall be filed as hereinafter required by section 16 of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, treas-

urer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz:

* * * * * * *

Name of corporation, ——.

Name the principal place of business of the corporation, company or association you represent. Owensboro, Ky.

Give the name and official position of the officer making this report.

Name, Samuel O. Miller; position, president.

The kind of business in which the said corporation, company or association is engaged.

Supplying water to citizens and city of Owensboro.

The amount of capital stock, preferred and common, of the said corporation, company or association, as of date November 15, 1892.

Preferred, none; common, 355000.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, on November 15, 1892.

Preferred, none; common, 3550.

Amount of capital stock, as above, paid up, $355000.00.

Par value of preferred stock, as above, $—.

Par value of common stock, as above, $100 per share.

Real value of the stock, as above. Preferred, $ none; common, $ nothing.

Highest price at which the stock above mentioned was sold at a *bona fide* sale within twelve months next before November 15, 1892.

$— per share, or no value, none ever sold.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 190–.

Surplus fund, $—; undivided profits, $—; value of all other assets, $—.

State the total amount of indebtedness, as principal, of the said corporation, company or association, on November 15, 1892.

$25,139.07–100 bills payable and $215000 in 1st mortgage bonds. Total debt, $240,139.07–100.

367 State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before November 15, 1892.

Gross earnings or income.....

Less expenses,

Total, $.....

(Not in blank form of 1892.)

$15,965.77, income from other sources, $6,600 from the city for hydrant rental, which we do not receive, but have pledged to bondholders.

Amount and kind of tangible property in this State owned by the said corporation, company or association, on November 15, 1892.

Amount of tangible property, $—.

Kind of tangible property. Pumping house, pumping machinery, five hydrants and C lot on which pumping house is erected, and one other town lot and about 4 acres of ground in Daviess county.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County, Daviess; city, Owensboro; town ——; number or name of taxing district or precinct ——.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$60000.00.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association. ——.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and taxing district in this State. (Give the length of line in each county, city, town or taxing district separately.)

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368 Also, the total length of the entire line or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this State ——.

State the entire gross and net income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 15, 190–.

Gross income, $—; net income or earnings, $—.

State the entire gross and net income or earnings received by the said corporation, company or association on business done in this State and elsewhere for the same length of time.

Gross income, $—; net income on earnings, $—.

(Not in the blank form of 1892.)

OWENSBORO WATER WORKS COMPANY,
By SAM'L A. MILLER, *Pres.*

COMMONWEALTH OF KENTUCKY, *Jefferson County,* } *ss.*

This day personally appeared before the undersigned, a notary public in and for the State and county aforesaid, Samuel A. Miller, pres., whose signature is attached hereto, and made oath

that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this 13th day of December, 1892.

WM. SACKETT,
Notary Public.

A copy attest:
W. F. GRAYOT,
Ass't Auditor.

Form A-8. Report of —— Located at —— for Nov. 15th, 1892 Received ——, 189–.

Form A–8. 9–3–2000

And on the back of each of said documents, marked A, B, C, D, E, F & G, is the following indorsement, to wit: Filed January 28, 1901. Thos. Speed, clerk. By Dudley Lindsey, D. C.

And on another day, to wit, on the 29th day of January, 1901, at the same term of said circuit court of the United States, at Owensboro, Kentucky, the following proceedings were had, to wit:

369 OWENSBORO WATER WORKS CO.
vs.
THE CITY OF OWENSBORO.

This day came the complainant, by W. T. Ellis and Bingham & Davies, its counsel, came also the defendant, by George W. Jolly, its counsel. The defendant by its said counsel filed an amended answer herein. By consent of parties, it is ordered that the replication heretofore filed herein be considered as filed to said amended answer. This cause coming on to be heard and having been argued by counsel and the court not being advised thereof takes time.

Said amended answer referred to above is of the following words and figures, to wit:

In the Circuit Court of the United States for the Sixth Judicial Circuit and District of Kentucky.

THE OWENSBORO WATER WORKS CO., Complainant,
vs.
THE CITY OF OWENSBORO, Defendant.

Amended Answer of the City of Owensboro.

The defendant, The City of Owensboro, comes and amends its answer herein and for amendment thereof says, that at the time of the passage of the ordinance of date March 19, 1900, and of filing its

answer herein, and now, the fair value of all the property, real and personal, of the complainant company was not greater or more than ninety thousand dollars.

(Signed) GEO. W. JOLLY,
City Attorney of the City of Owensboro.

UNITED STATES OF AMERICA, *District of Kentucky,* } *ss:*

This affiant, W. P. Small, says he is duly elected, qualified and acting mayor of the defendant, City of Owensboro; that he has read the foregoing amended answer and knows the contents thereof, and that he believes the statements therein contained are true.

W. P. SMALL.

370 Sworn to before me by W. P. Small, mayor of the city of Owensboro, this 29th day of December, A. D. 1900.

[NOTARY'S SEAL.] H. P. EAGLES, *N. P., D. C.*

My commission expires next General Assembly.

On the back of said amended answer is the following indorsement, to wit: Filed January 29th, 1901. Thos. Speed, clerk.

And on another day, to wit, on the 3rd day of June, at a regular term of the circuit court of the United States for the sixth circuit and district of Kentucky, Owensboro division, begun and held at the Federal Court hall in the city of Owensboro, Ky., on Monday, June 3, 1901, the Hon. Walter Evans, sitting as circuit judge, presiding, the following proceedings were had, to wit:

Circuit Court of the United States, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, Kentucky, Complainant,
vs.
CITY OF OWENSBORO and LAWSON RENO, Judge of the Police Court, Defendants. } Order.

This cause coming on for trial, the bill and the exhibits filed therewith and referred to therein, the demurrers to the bill, the answer and the amended answer and the exhibits filed and referred to therein and the replication *was* read on the final hearing.

The complainant also read in evidence the depositions of Owen Ford, Wilfred Walker, Charles Hermany, George D. Sidelinger, Edward Hughes, William J. McGonigal, George Long, Asa Williams, Frank Schefold, J. W. Holmes, C. C. Cooper, William Rudd, Thomas Yager, Henry Steubling, J. Tandy Ellis, and all the ex-

hibits referred to in the depositions of Charles F. Sturtevant, George Wigal, Robert A. Cummings, C. W. Bransford, Charles Broeker, E. B. Shifley, Charles Haney, F. A. Ames, and all the exhibits referred to in the depositions of the said witnesses and affidavits of James P. Wigal and Robert A. Cummings.

371 Defendant also read in evidence seven certified copies marked "A," "B," "C," "D," "E," "F," "G," being copies of the original reports on file in the office of G. G Coulter, auditor of the State of Kentucky, for the years 1892, 1893, 1894, 1895, 1896, 1897, 1898 and 1899, filed January 28, 1901.

This was all the evidence offered by either party and all the evidence heard at the trial.

Circuit Court of the United States, District of Kentucky, Owensboro Division.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, Kentucky, Complainant,
vs.
CITY OF OWENSBORO and LAWSON RENO, Judge of the Police Court, Defendants.
} Judgment.

The court having considered all the pleadings, exhibits, and evidence referred to in the foregoing order, and being advised, delivered a written opinion herein, which opinion is now filed and made a part of this record.

Pursuant to said opinion it is now ordered, adjudged and decreed that the complainant against the defendant, Lawson Reno, be and the same is dismissed and he recovers his costs herein expended and may have execution.

It is further ordered, adjudged and decreed by the court that the temporary injunction heretofore granted be and it is now made perpetual and the defendant, City of Owensboro, be and it is absolutely and perpetually enjoined from asserting, claiming or pretending to assert or claim that it as a municipality or otherwise has any power, right or authority, to interfere with, or to regulate by ordinance or otherwise the water rates fixed by the complainant, The Owensboro Water Works Company, of Owensboro, Kentucky, with its private consumers.

It is further ordered and decreed that the defendant, City of Owensboro, absolutely desist and refrain from claiming or pretending to claim that it has any right, power or authority, in virtue of its corporate existence, or otherwise, to fix the time when, the mode in which the complainant shall collect its water rents from its private consumers, or the rates which it shall charge same.

372 The defendant is further commanded to desist and refrain from the enforcement of any one of the provisions of the ordinance of March 19th, 1900, and from circulating among the citizens

of Owensboro the said ordinance for any purpose, and it is adjudged that the said ordinance is null and void.

It is further adjudged and decreed that the defendant The City of Owensboro refrain from attempting to prescribe rules or regulations with respect to water rents, or the mode of collecting same and from interfering in any way with complainant's rules and regulations with respect to the collection of water rates from private consumers or prices to be charged and from in any way interfering with the complainant in its rules and regulations and the water rates fixed by it between itself and its private consumers and customers.

It is further ordered, adjudged and decreed that the complainant, The Owensboro Water Works Company, of Owensboro, Kentucky, recover of the defendant, The City of Owensboro, its costs herein expended and it may have execution; to all of which the defendant, City of Owensboro, objects and excepts and prays an appeal, which is granted.

Said opinion referred to in said decree is of the following words and figures, to wit:

United States Circuit Court, District of Kentucky, at Owensboro.

OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
CITY OF OWENSBORO, ETC., Defendants. } Opinion.

Since the injunction *pendente lite* was granted in this case a good deal of evidence has been taken, more or less pertinent to the issues of fact raised by the pleadings, but upon the view I have been compelled to take of the case its decision must turn upon the question discussed in the opinion granting the temporary injunction, which I need not repeat. I will only add that time and reflection have more fully confirmed my conviction that the grounds upon which that decision was put are incontrovertible.

373 If the legislature has not, by section 3290 of the Kentucky Statutes, empowered the city council of Owensboro to pass the ordinance complained of in the bill, then the enforcement of that ordinance would violate the contract which exists between the complainant and the State of Kentucky as manifested by the complainant's charter, and, however much the legislature might change that charter the city council of Owensboro could not do so without legislative authority, even if such authority could be delegated to it at all. The enforcement of the ordinance of the city, which we have held to have been unauthorized and void, would, by the operation of such enforcement, take from the complainant certain portions of its money or property without due process of law, and without compensation, and would thus deny to it the equal protection of the law in violation of the Constitution of the United States. The views of the court in its former opinion are reiterated, and as the City of Owens-

boro had no authority to pass the ordinance, the complainant is entitled to the relief prayed for, and we need not go into a discussion of the other propositions which might arise upon the bill and answer.

The case being properly here, however, the court has the right to pass upon it in all its phases, and even though it puts its judgment upon the ground stated in the former opinion and in this one, there might be other grounds equally strong to justify the judgment rendered. Even if the city be without legislative authority to do what the ordinance undertakes to do, yet the case being properly here, the court may grant the full relief prayed for as it has jurisdiction of the action as presented upon the face of the bill.

Riggs *vs.* Clark, 18 C. C. A. 242
Pickham *vs.* Wheeler Co. 23 C. C. A. 391.
Schunk *vs.* Moline, etc., Co., 147 U. S. 500.
Scott *vs.* Donald, 165 U. S. 58.

If not already done the bill against Lawson Reno should be dismissed, but otherwise the relief prayed for should be granted with costs, and the temporary injunction should be made perpetual. A judgment may be prepared accordingly.

(Signed) WALTER EVANS, *Judge.*

June 3, 1901.

On the back of said opinion is the following indorsement, to wit: Filed June 3rd, 1901. Thos. Speed, clerk.

374 And on another day, to wit, on the 4th day of June, 1901, at a regular term of the circuit court of the United States for the sixth circuit and district of Kentucky, Owensboro division, begun and held at the Federal Court hall, in the city of Owensboro, Kentucky, on Monday, June 3rd, 1901. The Hon. Walter Evans, sitting as circuit judge, presiding, the following proceedings were had to wit:

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, }
vs.
THE CITY OF OWENSBORO, KENTUCKY, ET AL. }

This day came the defendant, The City of Owensboro, by Geo. W. Jolly, its counsel and filed its petition for an appeal, and assignment of errors herein and prays an appeal, which is granted. Came again the defendant by said counsel and filed its appeal bond herein for the sum of $500, which bond was approved by the court.

Said petition for an appeal was in the following words and figures, to wit:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS COMPANY, Complainant, *vs.* THE CITY OF OWENSBORO, Defendant. } In Equity. No. —.

The defendant, The City of Owensboro, conceiving itself aggrieved by the decree made and entered in the above entitled cause on the 3rd day of June, A. D. 1901, does hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit, for the reasons and on the grounds set forth and specified in the assignment of errors which is filed herewith, and said city prays that this appeal may be allowed and that a transcript of the rec-
375 ord, proceedings and papers upon which said order was made, may be sent to the United States circuit court of appeals for the sixth circuit.

GEORGE W. JOLLY,
Attorney for the City of Owensboro.

The foregoing claim of appeal is allowed.

On the back of said petition for an appeal is the following indorsement, to wit: Filed June 4th, 1901. Thos. Speed, clerk.

Said assignment of errors was in the following words and figures, to wit:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS COMPANY, Complainant, *vs.* THE CITY OF OWENSBORO, Defendant. } In Equity. No. —

Assignment of Errors.

And now on this the — day of June, A. D. 1901, came the defendant, The City of Owensboro, by its solicitor, George W. Jolly, in the above entitled cause and says that the decree and orders made in said cause are erroneous and against the just rights of said defendant city and contrary to law, for the following reasons, to wit:

First. Because the bill does not state a cause of action and on complainant's own showing it was not entitled to the relief prayed for, or to any relief.

Second. Because the court erred in holding that the city of Owens-

boro had not power and authority under its charter, the act of June 14, 1893, of the legislature of Kentucky, being the charter of cities of the third class, and the laws of the State, to regulate the price to be charged by complainant for water furnished by it to private consumers in the city of Owensboro.

Third. Because the bill does not state facts or show that the rates and prices for water prescribed and fixed by the ordinance entitled,

"An ordinance to fix and regulate prices and charges for
376 water furnished consumers and for other purposes," of date March 19, 1900, were unjust or unreasonable.

Fourth. Because the evidence in the record shows that the maximum rates and prices prescribed by said ordinance, are reasonable and just rates. That under the rates and prices fixed by the ordinance complainant can earn enough money to defray all legitimate expense of operating its plant, taxes, repairs, and a fair dividend on the value of its property.

Fifth. Because it appears that the rates charged by the complainant for water are unjust and unreasonable. That the complainant has issued and has now outstanding a large amount of stock and a large amount of bonds that do not represent money paid into the corporation; that four-fifths of the stock and bonds issued *is* of that character.

Sixth. Because on the pleadings and evidence in the record the bill should have been dismissed and judgment rendered for the defendant's costs.

GEORGE W. JOLLY,
Solicitor for the City of Owensboro.

On the back of said assignment of errors is the following indorsement, to wit: Filed June 4th, 1901. Thos. Speed, clerk.

Said appeal bond was of the following words and figures, to wit:

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS COMPANY, Complainant, *vs.* THE CITY OF OWENSBORO, Defendant. } In Equity. No. —.

Know all men by these presents, that we, The City of Owensboro, as principal, and John G. Delker and Charles Broeker, as sureties, are held and firmly bound unto the plaintiff, The Owensboro Water Works Company, in the just and full sum of five hundred dollars, to be paid to the said complainant, The Owensboro Water Works Company, *in the just and full sum of five hundred dollars, to be paid to the said complainant, The Owensboro Water Works*
377 *Company*, to which payment, well and truly to be made, we bind ourselves, jointly and severally by these presents.

Sealed with our seal- and dated this 4th day of June, A. D. 1901.

Whereas, lately at a circuit court of the United States for the district of Kentucky, in a suit in equity depending in said court, between The Owensboro Water Works Company, complainant, and The City of Owensboro, defendant, a decree was rendered against the City of Owensboro, and the said City of Owensboro having been granted an appeal from said decree in the aforesaid suit, and a citation directed to the said Owensboro Water Works Company citing it and admonishing it to be and appear at a session of the United States circuit court of appeals, for the sixth circuit to be holden at the city of Cincinnati.

Now, the condition of the above obligation is such, that if the said City of Owensboro shall prosecute said appeal to effect and answer all cost if it shall fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

THE CITY OF OWENSBORO,
By W. P. SMALL, *Mayor.*
JOHN G. DELKER.
CHAS. BROEKER.

Sealed and delivered in presence of:
HENRY F. CASSIN,
Deputy Clerk U. S. Courts.

On the back of said appeal bond is the following indorsement, to wit: Filed June 4th, 1901. Thos. Speed, clerk.

On the 22nd day of July, his honor, Walter Evans, signed the citation herein; service of which was accepted by the appellee's counsel on the 24th day of July, 1901.

Said citation is attached hereto with the acceptance on the back thereof.

UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, } *ss:*

To the Owensboro Water Works Company of Owensboro, Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth
378 circuit, to be holden at the city of Cincinnati, in said circuit, on the * 19th day of August, next, pursuant to an appeal allowed by the circuit court of the United States for the district of Kentucky, Owensboro division, wherein The City of Owensboro is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22nd day of July, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-sixth.

[SEAL.] WALTER EVANS, *Judge.*

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* Not exceeding 30 days from the day of signing.

Service of the citation is accepted.

SWEENEY, ELLIS & SWEENEY,
Att'ys for Owensboro Water Works Company, Appellee.

July 24, 1901.

102. Owensboro Water Works Co., of Owensboro, Kentucky, *vs.* City of Owensboro. Citation.

379 And on another day, to wit, on the 5th day of May, 1902, at a regular term of the circuit court of the United States for the sixth circuit and western district of Kentucky, Owensboro division, begun and held at the Federal court hall, in the city of Owensboro, Kentucky, on Monday, May 5th, 1902. The Hon. Walter Evans, sitting as circuit judge, presiding, the following proceedings were had, to-wit:

OWENSBORO WATER WORKS CO.
vs.
THE CITY OF OWENSBORO.

This day came the defendant by counsel and filed the mandate of the United States circuit court of appeals herein the mandatory part *thereof* which is as follows: "It is now here ordered adjudged and decreed by this court that the appeal herein be dismissed with costs for want of jurisdiction."

Came again the defendant by its counsel and filed its petition for an appeal & assignment of errors herein and prays an appeal to the Supreme Court of the United States which is granted.

Came again the defendant by counsel and filed its appeal bond herein in the sum of $500 which bond was approved by the court.

Said mandate is in words and figures as follows to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Kentucky, Greeting:

Whereas, lately in the circuit court of the United States for the western district of Kentucky, before you or some of you, in a cause

between The Owensboro Water Works, complainant and The City of Owensboro, respondent, wherein a decree was entered in
380 favor of said complainant and against said respondent.

As by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the sixth circuit by virtue of an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and one, the said cause came on to be heard before the said United States circuit court of appeals for the sixth circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the appeal herein be dismissed with costs for want of jurisdiction.

APRIL 8, 1902.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of April, in the year of our Lord one thousand nine hundred and two.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

The opinion of the United States circuit court of appeals is in the following words and figures, to-wit:

381 United States Circuit Court of Appeals, Sixth Circuit.

CITY OF OWENSBORO, Appellant, *vs.* OWENSBORO WATERWORKS, Appellee.	No. 1007. Appeal from the Circuit Court of the United States for the Western District of Ky.

Submitted Feb. 12, 1902; decided April 8, 1902.

Before Day and Severens, circuit judges, and Wanty, district judge.

SEVERENS, *Circuit Judge:*

The Owensboro Water Works Company, a Kentucky corporation, filed the bill in this case in the circuit court for the purpose of restraining the City of Owensboro from putting in execution a certain ordinance, which the common council of the city had passed for the purpose of regulating the rates at which water should be supplied

to the people of that city, and the collection of such rates; and also for the purpose of requiring the water works company to put meters into the lines of pipe supplying the water to the several consumers in certain conditions specified. The bill sets forth the ordinances and the terms of the contract under which it was supplying water to the city and its inhabitants—the contract being one between the city and the predecessor of the water works company, to whose rights the water works company had, with the consent of the city, succeeded, and certain supplementary stipulations between the city and the water works company made at the time when the latter took over the contract from its predecessor. The ordinance granting the franchise to the predecessor contained the following provisions:

SECTION 9. "The said company shall have the power and authority to make and enforce as part of the condition upon
382 which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law, or the provisions of this ordinance."

SECTION 10. "The city will adopt and enforce all ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition and against injury to the hydrants rented by it to said city and against waste of water by consumers."

And the bill alleges that the water works company had established, and was operating under, rules and regulations pursuant to the authority of these sections of the ordinances. Thereupon the bill proceeds to allege that on March 12, 1900, the common council of the city passed an ordinance fixing the rate at which the company should supply water to the inhabitants of the city, denying the company the right to collect the rents in advance and requiring it to put in meters for measuring the water delivered in certain case specifically provided for.

The bill alleges further, that the city claims and pretends that it had rightful authority to pass this ordinance and that it is valid, and that the city intends to enforce it. The complainant thereupon alleges against the ordinance, that it is in contravention of the grant to the company of the right to make rules and regulations; that the city has no lawful authority to fix the rates at which the company shall charge its customers; that the rates fixed by the ordinance are so low and the requirements made so oppressive, that the company can not conform to them and obtain any income from its investment, and, in fact, could not carry on its business without positive loss. The insistance of the bill is that the ordinance is in violation of the constitution of Kentucky, which forbids *ex post facto* laws and laws impairing the obligation of contracts; and it is also insisted that the ordinance is in contravention of the 5th amendment to the Constitution of the United States in that it takes private property for public use without just compensation, and also of the 14th amendment to the Constitution of the United States, which provides that: "No State shall make or enforce any law, which will

abridge the *provisions* or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its precincts the equal protection of the laws."

The answer admits the passage of the ordinance and the intention of the city to enforce it; claims that it had lawful authority
383 to pass it; denies that it is prohibited by any of the provisions of the constitutions of Kentucky or of the United States above referred to, or that it is unreasonable, or that it prevents the company from securing a fair return on its investment.

Other averments are made in the pleadings, but it is unnecessary to recite them for the present purpose. The foregoing contains the substance of the controversy. Proofs were taken and at the hearing the circuit court decided in favor of the complainant, upon the ground that the legislature of Kentucky had not delegated to the city the power to pass such an ordinance, referring to section 3290 of the Kentucky Statutes, which contains the grant of power in respect to such subjects to municipalities of that class to which the city of Owensboro belongs. That section reads as follows: "Section 3290. The common council of said city shall, within the limitations of the constitution of the State and this act, have power, by ordinance; * * * 5th, to provide the city and the inhabitants thereof with water, light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the price to private consumers and customers." The construction adopted by the court was, that the power of the city to make rules and regulations extended only to water works constructed and operated by itself; and the court seems to have held that the city had no other power in the premises than the power thus expressly conferred.

An appeal was taken to this court and, prior to its being reached for hearing, the appellee moved to dismiss the appeal upon the ground that this court had no jurisdiction to entertain it, but that it should have been taken to the Supreme Court because the case involved the question whether the ordinance complained of was in contravention of the Constitution of the United States. Upon the submission of the motion we passed an order, directing that it be postponed to the hearing on the merits and be then heard. The case having now been fully argued, the first question with which we have to deal is that arising upon the motion to dismiss the appeal. Inasmuch as an ordinance of a municipality, if passed under the authority of a power over the subject-matter delegated to it by the legislature of a State, stands upon the footing of a legislative act for the purpose of determining whether a right, secured by the Constitution of the United States, has been infringed thereby, and such
a case is upon that ground regarded as one falling within
384 the jurisdiction of the Federal courts, we see no reason to doubt that such an ordinance is to be regarded as a law of the State within the meaning of section 5 of the act of March 3,

1891, creating the circuit court of appeals and distributing the appellate jurisdiction. Perhaps we should add the proviso, which would apply to both the original and appellate jurisdictions, that the case be one in which there is good color for the claim that the ordinance was in fact passed under a delegated authority. But we think, without going into a discussion of the matter, that there is fair ground in the present case for contending that the common council had legislative authority for dealing with the subject to which the ordinance relates. The question is, therefore, whether the appeal in this case is one comprehended within the classes of cases enumerated by section 5 of the act referred to. If it is, it must be taken to the Supreme Court; for it is only of such cases as remain after those enumerated in section 5 have been carved out of the whole body of appellate cases, that the circuit courts of appeals have jurisdiction. And as was said by Ch. Justice Fuller in American Sugar Refining Co. *v.* New Orleans, 181 U. S. 277, "where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law, or treaty of the United States, Gold Washing & Water Co. *v.* Keyes, 96 U. S. 199; Blackburn *v.* Portland Gold Mining Co., 175 U. S. 571; Western Union Telegraph Co. *v.* Ann Arbor Railroad Company, 178 U. S. 239," such a case falls within the exclusive appellate jurisdiction of the Supreme Court. Looking at the language of the act we can see no good reason for thinking that the destination of the appeal is altered by the circumstance that other questions, besides those enumerated in section 5, are comprehended in the controversy which the case presents. It is still, and none the less, a case in which a question arises of the character specified in designating what cases must go by appeal or writ of error to the Supreme Court. The appeal or writ of error in all cases, in which no question of the character described in section 5 is involved, goes to the circuit court of appeals under the operation of section 6, which expressly bounds the appellate jurisdiction of the latter court in that way. Saving such questions as arise under the first clause of the enumeration of section 5, relating to the original jurisdiction, and the consideration of
385 the effect of making final the judgments of the circuit courts of appeals when the jurisdiction of the circuit court depends upon diversity of citizenship by section 6 (a matter to which we shall presently recur), this makes the line of demarcation clear, and the only difficulty to be encountered in prosecuting an appeal or writ of error is in determining whether or not there is in truth a question involved in the controversy comprehended in the classes mentioned in section 5.

Respecting those cases where the jurisdiction of the circuit rests upon diversity of citizenship, it was distinctly held in Loeb *v.* Columbia Township Trustees, 179 U. S. 472, that it was immaterial in determining the appellate jurisdiction of the Supreme Court that

the Federal question did not become involved by the plaintiff's pleading, but was brought in by a claim set up in defence. That determination seems to settle the proposition that regard is to be had, not alone to the particular ground on which the trial court acquired jurisdiction, but to all the questions which arose during its progress and were determined by the judgment; and the grounds on which that decision proceeded seem unanswerable. The result was that the appeal was held properly brought to the Supreme Court notwithstanding the Federal question had been brought into the case by the answer of the defendant. But the ground on which the original jurisdiction rested in that case was that of diversity of citizenship, and the court went on to say that the appeal might also have been taken to the circuit court of appeals. This was, as we understand, because of the peculiar provision in the 6th section of the act, that "the judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." The result of this holding would seem to be that the appellate tribunal in such a case, that is, where jurisdiction has been acquired upon the ground of diverse citizenship and Federal questions are also involved, is not fixed by the law, but is left to the choice of the party, carrying out in this respect the analogy of the rule applied to a question of the right to appeal arising under the first clause relating to the jurisdiction of the trial court. And the law had been so held in several previous cases, Colorado Central Mining Co. *v.* Turck, 150 U.S. 135; Press Publishing Co. *v.* Monroe, 164 U.S. 105; *Ex parte* Jones, 164 U.S. 691. But that propo-
386 sition is not here involved, because the jurisdiction of the circuit court rested entirely upon the Federal question.

In the case before us, the parties were both citizens of Kentucky and the jurisdiction was invoked on account of the presence of a Federal question of the class included in section 5 of the appellate act. It is true the circuit court decided the case upon another ground, but upon appeal the whole case is opened and the appellate court will give such judgment as the case requires, and plant the judgment upon such ground as it thinks it ought to be. The question here is not affected by the circumstance that the court below made the case turn on another point.

The appellant relies upon language used by the Chief Justice of the Supreme Court in delivering the judgment in Carter *v.* Robert's, 177 U. S., at p. 500, where it was said that "when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the case in the first instance." But we think this language was probably intended to be modified by limitations not fully expressed, and

that this inference is warranted by former decisions of the court and by the language used by the Chief Justice in qualifying the foregoing expression in American Sugar Refining Co. *v.* New Orleans, 181 U. S., at p. 282, and especially by his language in delivering the opinion of the Supreme Court in Huguley Mfg. Co. *v.* Galeton Cotton Mills, October term, 1901, when he said, "If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive."

Because it is clear that the cases first instanced are within the exclusive jurisdiction of the Supreme Court. But if the original jurisdiction is founded entirely upon the ground of diversity of citizenship and a constitutional question becomes involved, the appeal might go to either court. If it should go to the Supreme Court, that court would, of course, decide the whole case; if to the court of appeals, that court might also decide the whole case, or certify the constitutional question to the Supreme Court and, on receiving its answer, decide the case. If it should decide the constitutional
387 question in the first instance, the unsuccessful party might apply for the writ of certiorari under the provision of the 6th section to correct any mistake made by the court of appeals upon the subject. Thus is accomplished the whole scheme by which Congress intended to give to the Supreme Court by one method or another appellate power over all constitutional questions.

We have not failed to notice that the circuit court of appeals for the eighth circuit, departing from its own former decisions, reached a different conclusion in Pike's Peak Power Co. *v.* City of Colorado Springs, 105 Fed. 1, from that which we have expressed, being constrained thereto by a misapprehension of the meaning of the language above quoted from Carter *v.* Roberts. But we have had the advantage of the instruction afforded by the later utterances of the Supreme Court in regard to the interpretation which should be put upon the language employed in the Carter case, and feel relieved from the constraint which induced the decision in the case of The Pike's Peak Power Co. *v.* City of Colorado Springs.

In this case, for the reasons that a constitutional question was directly involved by the plaintiff's pleading and the jurisdiction of the court below was not based upon diverse citizenship, so as to give us jurisdiction of the appeal upon that ground, we are constrained to think that the exclusive jurisdiction is given to the Supreme Court under the 5th section of the act above mentioned, and that the appeal should be dismissed.

It is so ordered.

388 Said petition for an appeal is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF OWENSBORO, Defendant.

Petition for Appeal.

The defendant, The City of Owensboro, in the above entitled cause, conceiving itself aggrieved by the decree rendered, made and entered in the above entitled cause on the third day of June, A. D. 1901, does hereby appeal from said orders and decrees to the Supreme Court of the United States, for the reasons and on the grounds set forth and specified in the assignment of errors which is filed herewith, and said City of Owensboro prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and decree was made, rendered and entered, may be sent to the Supreme Court of the United States.

GEO. W. JOLLY,
Solicitor for City of Owensboro.

On the back of said petition for an appeal is the following indorsement, to-wit:—Filed May 5th. 1902 Thos. Speed clerk.

389 Said assignment of errors is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF OWENSBORO, Defendant.

Assignment of Errors.

And now, on this, the 5th day of May, A. D. 1902, came the defendant in the above entitled cause, The City of Owensboro, by its solicitor, George W. Jolly, and says that the decree and orders made in said cause are erroneous and against the just rights of the said defendant City of Owensboro and contrary to law for the following reasons, to-wit:

First. Because the complainant's bill does not state a cause of action and on complainant's own showing it was not entitled to the relief prayed for or to any relief. And the demurrer thereto should have been sustained.

Second. Because the court erred in holding and adjudging that

the City of Owensboro had not power and authority under its charter, that is under the act of the legislature of the Commonwealth of Kentucky of June 14, 1895, being the charter of cities of the third class, and under the laws of the Commonwealth, to fix and regulate the prices to be charged by the complainant for water furnished by it to private consumers in the City of Owensboro.

Third. Because the court erred in holding and adjudging that the City of Owensboro had not power and authority under its said charter, the said act of June 14, 1893, of the legislature of the Com-
390 monwealth of Kentucky, and the laws of the State to enact the ordinance, entitled, "An ordinance to fix and regulate prices and charges for water furnished consumers and for other purposes," of date March 19, 1900.

Fourth. Because the bill of the complainant does not state facts or show that the rates and prices for water prescribed and fixed by the ordinance entitled, "An ordinance to fix and regulate prices and charges for water furnished consumers and for other purposes," of date March 19, 1900, were unjust or unreasonable or contrary to law.

Fifth. Because upon the whole record and upon the evidence in the record, it is shown that the maximum rates and prices prescribed by said ordinance are reasonable and just rates. That under the rates and prices fixed by said ordinance complainant can earn and collect enough money to defray all legitimate expense of operating its plant, its taxes, and repairs, and pay a fair and reasonable dividend on the value of its property employed in the service.

Sixth. Because the court erred in enjoining the city from enforcing the whole ordinance, especially the fifth section and the sixth section thereof: that is to say, though the court might have been of opinion that the rates prescribed by the ordinance were unjust or too low, yet it erred in enjoining the enforcement of the fifth section which was passed for the protection of the public health. And also erred in enjoining the sixth section which was intended to compel the complainant to furnish the city facts which would enable it to fix just rates.

Seventh. Because the court erred in adjudging and decreeing that the City of Owensboro refrain from attempting to prescribe rules or regulations with respect to water rents or the mode of collecting same and from interfering in any way -- the complainant's rules and regulations with respect to the collection of water rates from
391 private consumers or prices to be charged and from in any way interfering with the complainant in its rules and regulations, and the water rates fixed by itself and its private consumers and customers.

Eighth. Because the court erred in decreeing in effect that the City of Owensboro should not in the exercise of the general police powers enact any ordinance for the protection of the public health or the preservation of property or the public convenience, or the preservation of its streets, that would affect the complainant, or to pass any ordinance for the protection of the public that would affect the complainant.

Ninth. Because the decree is contrary to law, and is not supported by the evidence and is contrary to the evidence, and goes beyond the issues formed.

Tenth. Because on the pleadings and evidence in the record the complainant's bill and suit should have been dismissed and judgment rendered in favor of the city for its costs.

GEORGE W. JOLLY,
Solicitor for the City of Owensboro.

On the back of said assignment of errors is the following indorsement, to-wit: Filed May 5th, 1902 Thos. Speed clerk.

392 Said appeal bond is in the following words and figures, to-wit:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, *ss:*

THE OWENSBORO WATER WORKS COMPANY, Complainant, *vs.* THE CITY OF OWENSBORO, Defendant. } In Equity. No. —.

Bond.

Know all men by these presents, that we, The City of Owensboro, as principal, and John G. Delker and Charles Broeker, as sureties, are held and firmly bound unto the plaintiff, The Owensboro Water Works Company, in — just and full sum of five hundred dollars, to be paid to the said complainant, The Owensboro Water Works Company, *in the just and full sum of five hundred dollars, to be paid to the said complainant, The Owensboro Water Works Company,* to which payment, well and truly to be made, we bind ourselves, jointly and severally by these presents.

Sealed with our seal- and dated this 5th day of May, A. D. 1902.

Whereas, lately at a circuit court of the United States for the western district of Kentucky, in a suit in equity depending in said court, between The Owensboro Water Works Company, complainant, and The City of Owensboro, defendant, a decree was rendered against the City of Owensboro, and the said City of Owensboro having been granted an appeal from said decree in the aforesaid suit, and a citation directed to the said Owensboro Water Works Company citing it and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C. at its next October term.

Now, the condition of the above obligation is such, that if
393 the said City of Owensboro shall prosecute said appeal to effect and answer all costs if it shall fail to make said plea good

then the above obligation to be void, else to remain and be in full force and virtue.

THE CITY OF OWENSBORO,
By MARTIN YEWELL, *Mayor.*
CHAS. BROEKER.
JOHN G. DELKER.

Sealed and delivered in presence of
DUDLEY LINDSEY, *U. S. Com'r.*

On the back of said appeal bond is the following indorsement, to-wit:—Filed May 5th. 1902 Thos. Speed clerk.

394 UNITED STATES OF AMERICA, *Western District of Kentucky, Owensboro Division, Sixth Judicial Circuit,* } *ss:*

To the Owensboro Water Works Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the city of Washington, D. C., on the* 4th day of June next, pursuant to an appeal granted by the circuit court of the United States for the western district of Kentucky, Owensboro division wherein The City of Owensboro is appellent and you are appellee to show cause if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Circuit Court of the United States, Wes. Dist. of Ky., O'boro Div.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of May, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty sixth.

WALTER EVANS, *Judge.*

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* Not exceeding 30 days from the day of signing.

Executed on the Owensboro Water Works Co. by delivering a true copy hereof to J. J. Sweeney pres. of said Co. On the attorneys of the said Co. by delivering a true copy hereof to W. T. Ellis member of the firm of Sweeney, Ellis, & Sweeney attorneys of the said Co.

This May 13" 1902.
Fees, $4.00.

A. D. JAMES,
U. S. Marshal, W. D. Ky.,
By M. C. JAMES, *D. M.*

[Endorsed:] J. J. Sweeney. $\frac{1902}{102}$ The Owensboro Water Works Co. *v.* The City of Owensboro Citation & 2 copies Received May 13 1902 M. C. James D. M. Bond for costs Dudley Lindsey D. C.

395 Circuit Court of the United States for the Sixth Judicial Circuit and Western District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

I, Thomas Speed, clerk of the circuit court of the United States, for the sixth judicial circuit, western district of Kentucky, Owensboro division, do hereby certify that the within and foregoing three hundred and ninety four (394) typewritten and printed pages contain a full and true transcript of the record of the proceedings had in said court in the suit wherein The Owensboro Water Works Company of Owensboro, Kentucky, was complainant, and The City of Owensboro, Kentucky, defendant, as the same remains of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at my said office this 19th. day of May A. D. 1902. and of our Independence the 126.

[Seal Circuit Court of the United States, Wes. Dist. of Ky., O'boro Div.]

THOS. SPEED, *Clerk*,
By DUDLEY LINDSEY,
Deputy Clerk.

Endorsed on cover: File No. 18,546. W. Kentucky C. C. U. S. Term No. 58. The City of Owensboro, appellant, *vs.* The Owensboro Water Works Company. Filed May 28, 1902.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 58

City of Owensboro, ... Appellant

v.

Owensboro Water Works Co., . . Appellee

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF AND ARGUMENT FOR APPELLANT

STATEMENT.

The Owensboro Water Co., the so called "predecessor" and "assignor" of the appellee, the Owensboro Water Works Co., was organized September 9, 1878, under the general laws of the state of Kentucky, authorizing persons to associate themselves for carrying on business and to file articles in the county clerk's office of the county court where such business was to be carried on. Acts

1869, pp. 70-94, Gen. Stats. Chap. 56. The capital stock was fixed at $80,000. The object of the corporation was to construct at Owensboro a water plant, with pumping station, machinery, pipes, etc., for supplying the city and the inhabitants of the city with water from the Ohio river. The original cost of the plant was about $40,000. Subsequent additions were made costing about $30,000 and since then from time to time other additions have been made which have probably increased the cost of the property used and employed in the service to approximately $105,000.

An ordinance was passed by the City of Owensboro and accepted by the water company September 10, 1878, (Record pp. 30 to 35), whereby the company was authorized to lay its pipes and mains in the streets of the city; the city also agreeing to rent a number of hydrants at certain specified prices. This contract for hydrant rental was to run twenty-five years, the whole life of the company, and expires September 10, 1903. It is not in any way involved in this suit.

October 1, 1878, the company made a mortgage on all its property to secure the payment of bonds amounting to $50,000, payable twenty-five years after date.

Again October 1, 1884, the company made another mortgage on its property to secure the payment of one hundred bonds of $1,000 each, payable twenty-five years after date. It is alleged that of all the money realized on the stock and bonds, no more than $105,000 was delivered to or expended by the corporation.

2. The Owensboro Water Works Co., the appellee, was organized May 30, 1889, under the Gen. Stats. Ch. 56. This company was organized to acquire the franchise, property and con-

tracts and carry on the business of the Owensboro Water Co. Its capital stock was fixed at not less than $300,000 and not exceeding $500,000. The stock issued now amounts to $355,000. The property of the old company was conveyed June 10, 1889, to the new company for the recited consideration of $295,000 of stock and $200,000 of the first mortgage bonds of the new company. The stockholders of the two companies being practically the same

July 1, 1889, a mortgage was made by the present company for $250,000. All these bonds except $237,000 have been paid. There is a floating debt also of $20,000, making the total debt of the company $257,000.

The water system is inadequate and insufficient; its pipes are too small, its intake is in an eddy and the water unwholesome, and is not filtered; there is no standpipe or reservoir; the mains are not flushed and they become foul with mud and decaying matter; adequate fire protection is not afforded. The company has no uniform rates, they are arbitrary and unjust.

The income of the company is between $29,000 and $32,000 per annum; that the cost of operating the plant for the year 1890 was $5,771; for 1888, $6,210.20; for 1897, $4,208.20; that the annual depreciation does not exceed $2,500; that the whole of its taxes for 1899 was $2,220. It is alleged that the rates prescribed by the ordinance will produce $17,000 to $18,000 per annum aside from $7,400 paid by the city for hydrant rentals, a total of $25,000.

In 1895 the common council went into an investigation for the purpose of fixing rates, but the company's officers, especially its president, Callahan, refused to give the city authorities any facts or furnish any information that would enable the city to fix

fair rates. The ordinance complained of was introduced in the council and given its first passage March 12, 1900, by the committee appointed to investigate and prepare an ordinance fixing rates; it was published and commented on in the city newspapers, was known to the company but it sought no hearing and failed or refused to appear or offer any reasons against the passage of it. The rates prescribed by the ordinance are just and fair and will enable the company to pay operating expenses, taxes, wear and tear and leave a net income of about $13,000. The value of all the company's property is not greater than $90,000. The mortgage debts are fraudulent and void. The water company is a practical monopoly; it is the only water company in the city.

The ordinance prescribing rates was finally passed by the common council and approved by the mayor, March 21, 1901, and is published in the record pp. 31 to 35.

The answer traverses all the material allegations of the bill and then it sets out the organization of the Owensboro Water Company, the alleged assignor of the appellee and gives a succient history of its organization, the amount of its stock, mortgage debt, value of its property, franchises, etc., its income and cost of operation in detail. The amount that can be realized under the ordinance from sale of water, the value of the property, etc., of the company, cost of operation and alleges that a net income of $17,000 will remain, or about seventeen per cent. on the value of the property employed in the service.

It is claimed by appellee that by section 9 and 10 of the ordinance of September 10, 1878, the water company had the right to establish rules, fix rates and regulate the mode and manner

in which private consumers of water should pay their water rents. That the purchase by the appellee of the Owensboro Water Company was assented to by the City of Owensboro, by the ordinance of June 3, 1889, Record pp. 25, 29. That the rates of charges prescribed in and by the ordinance of March 21, 1900 are so low as to destroy appellee's property, and that the city had not for that reason power to enact it. That its annual income under the ordinance would not amount to as much as $17,000. It is not mentioned in the bill that it has an annual income from the city under the contract for hydrant rentals, which is unaffected by the ordinance, of $7,400 additional.

It is contended by appellant that the gross annual income of the appellee is approximately $30,000, of which $7,400 is paid by the city for hydrant rent, and the remainder, $22,600, by private consumers of water; that its annual expense of operation is approximately $6,000, taxes $2,500, and its annual depreciation of wear and tear, if this is to be estimated, is not exceeding $2,000 to $2,500. That the reduction made by the ordinance cannot exceed thirty per cent. of its income from private consumers, say $6,780 and that a net income of approximately $13,000 will annually remain, or twelve to thirteen per cent. on the value of the property employed in the service. That the fair value of appellee's whole property is approximately $90.000 to $100,000.

And that the supply of water is inadequate; that the water is unfiltered, there being no reservoir, stand-pipe or other mode of settling or filtering it; that it is unhealthy, the pipes and mains are never flushed; that the value of the service rendered is as little as possible; that the rates charged are arbitrary and exorbitant.

The charter of appellee is printed in Record, pp. 28-30.

The general law of the state of Kentucky under which the charter was obtained is printed at the foot of this brief as "Appendix A."

The General Reservation Law of the state, enacted February 14, 1856, and in force since that time, is printed at the foot of the brief as "Appendix B."

The Assignment of Errors is printed in Record pp. 389-394. It is alleged that the court below erred to the prejudice of appellant as follows:

> "First: Because the complainant's bill does not state a cause of action and on complainant's own showing it was not entitled to the relief prayed for or to any relief. And the demurrer thereto should have been sustained.
>
> Second: Because the court erred in holding and adjudging that the City of Owensboro had not power and authority under its charter, that is under the act of the legislature and the Commonwealth of Kentucky of June 14, 1895, being the charter of cities of the third class, and under the laws of the Commonwealth, to fix and regulate the prices to be charged by the complainant for water furnished by it to private consumers in the City of Owensboro.
>
> Third: Because the court erred in holding and adjudging that the City of Owensboro had not power and authority under its said charter, the said act of June 14, 1893, of the legislature of the Commonwealth of Kentucky, and the laws of the state to enact the ordinance, entitled, 'An ordinance to fix and regulate prices and charges for water furnished consumers and for other purposes,' of date March 19, 1900.

Fourth: Because the bill of the complainant does not state facts or show that the rates and prices for water prescribed and fixed by the ordinance entitled, 'An ordinance to fix and regulate prices and charges for water furnished consumers and for other purposes,' of date March 19, 1900, were unjust or unreasonable or contrary to law.

Fifth: Because upon the whole record and upon the evidence in the record, it is shown that the maximum rates and prices prescribed by said ordinance are reasonable and just rates. That under the rates and prices fixed by said ordinance complainant can earn and collect enough money to defray all legitimate expense of operating its plant, its taxes, and repairs and pay a fair and reasonable dividend on the value of its property employed in the service.

Sixth: Because the court erred in enjoining the city from enforcing the whole ordinance, especially the fifth section and the sixth sectiou thereof; that is to say, though the court might have been of opinion that the rates prescribed by the ordinance were unjust or too low, yet it erred in enjoining the enforcement of the fifth section which was passed for the protection of the public health. And also erred in enjoining the sixth section which was intended to compel the complainant to furnish the city facts which would enable it to fix just rates.

Seventh: Because the court erred in adjudging and decreeing that the City of Owensboro refrain from attempting to prescribe rules or regulations with respect to water rents or the mode of collecting same and from interfering in any way—the complainant's rules and regulations with respect to the collection of water rents from private consumers or prices to be charged and from in any way interfering with the complainant in its rules and regulations, and the water rates fixed by itself and its private consumers and customers.

Eighth: Because the court erred in decreeing in effect that the City of Owensboro should not in the exercise of the general police powers enact any ordinance for the protection of the public health or the preservation of property or the public convenience, or the preservation of the streets, that would affect the complainant, or to pass any ordinance for the protection of the public that would affect the complainant.

Ninth: Because the decree is contrary to law, and is not supported by the evidence and is contrary to the evidence, and goes beyond the issues formed.

Tenth: Because on the pleadings and evidence in the record the complainant's bill and suit should have been dismissed and judgment rendered in favor of the city for costs."

ARGUMENT.

I. The complainant's bill is a long, discursive document containing much repetition, stating matters in a most general way and omitting many material facts necessarily within its knowledge and essential to be considered by the court in determining the primary and most important question involved, namely, whether the rates prescribed by the ordinance passed by the common council of the City of Owensboro, March 21, 1900, are just rates or not.

(*a*) The bill fails to allege the *present value* of the complainant's property or the *original cost* thereof. No statement is given of what the property consists of, or its character or condition, the amount of its real estate and the condition of the

buildings thereon, the number of its engines, pumps and pipe connections, its street mains, the extent of its pipe system, the size of the pipe, its hydrants, valves, etc.

(*b*) The amount of the capital stock of the company is not given, nor is it stated whether the stock actually represents money or property paid into the corporation or conveyed or delivered to it at a fair value.

(*c*) The amount of the bonded debt of the company is not stated, or the annual interest thereon and whether this bonded debt was created for the benefit of the corporation; that is, whether the money realized on these bonds went into the corporation or not; nor is the amount of any other indebtedness stated, or for what purpose such indebtedness was created.

(*d*) No statement is made in the bill except in a very general way and inferentially of the annual cost or expense of operating the water works plant or system. The amount paid out for salaries to officers, if any, of wages to engineers, and other employees, cost of coal, annual taxes, etc., is not alleged. Such cost and expense should have been alleged in detail. It is stated only in a general way that the annual necessary expense of operation is over $13,000.

(*e*) The annual gross income of the company and the sources of it, that is, the amount collected from the defendant city for hydrant rentals under its contract with the city, the amount charged for water delivered to private consumers and the amount annually collected therefor, and the amount annually uncollected, is not stated.

(*f*) It does not state any facts or give any basis upon which an estimate can be made of the actual annual depreciation of

the plant, but states generally that the natural wear and tear subjects it to an annual expense of not less than $4,000.

(*g*) There is no allegation of facts which will enable the court to determine *the value of the service rendered* by the company to the public.

All these facts are material and should have been alleged so that the court might determine on the face of the bill whether the rates fixed by the ordinance were reasonable, and to lay a proper and sufficient foundation for the introduction of evidence. In every system of procedure, allegations not supported by evidence and evidence offered without allegation of the fact are equally ineffectual. If the complainant's bill is insufficient, that is, fails to state fully the facts which show the complainant entitled to an injunction, it should be denied, though the complainant's evidence would warrant the granting of an injunction. On a motion for a preliminary injunction, the case, with its ground for relief, must be stated by the bill itself, and the scope of the bill cannot be enlarged by the evidence: Leo v. U. P. Railway Co., 17 Fed. 273; Type Foundry v. Carter & Gibson, 31 Fed, 524; 4 McLean, 272; 20 Fed. 545: Foster's Fed. Prac. secs. 232, 233.

And of course unless the foundation is laid in the bill itself for the evidence that may be offered by the complainant, he is not entitled to the relief sought though the evidence might warrant the relief. But it is contended not only that the bill contains no ground for equitable relief, but that the evidence presented by the complainant is likewise insufficient.

II. Pursuant to section 156 of the present Constitution of Kentucky, the General Assembly, by an act approved Septem-

ber 30, 1892, Ky. Stats. sec. 2740, classified the cities of the state placing the cities of Owensboro, Bowling Green, Henderson, Paducah and Frankfort in the third class.

Afterwards, by an act approved June 14, 1893, Ky. Stats. secs. 3236 and 3440, the General Assembly passed a general law for the government of cities of the third class, and this is the statute under which cities of this class are now governed in the state of Kentucky.

By section 3256 it is declared that "This act shall be a public act and be judicially noticed and liberally construed by the courts and all previous charters of the cities embraced herein, and all amendments thereto are hereby repealed." But by sec. 3258 all vested rights under previous charters are protected and saved.

It will be observed upon an examination of the provisions of this charter of cities of the third class that very full powers are conferred for the purposes of local government. It will be necessary for the court to especially examine several parts of it, among others the following :

"Sec. 3290. The common council of each of said cities shall within the limitations of the constitution of the state and this act have power by ordinance : * * *

5. To provide the city and the inhabitants thereof with water, light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the prices to private consumers and customers."

Sec. 3426 authorizes the common council to establish a board of public works for the city. This, however, has never been done in Owensboro. "When no board of public works has been established the duties herein imposed shall be performed by the common council, and such other employes and agents as said common council may elect or designate."

"Sec. 3438. The board of public works shall have the exclusive power and control over the construction, supervision, cleaning, sprinkling, repairing, grading and improving of all streets, alleys, avenues, lanes, public cemeteries, parks, squares, fountains, wharves and landings, market-houses and places, bridges, sewers, drains, ditches, culverts, streams, canals and water courses, sidewalks, curbing, and the lighting of all such public places as may be deemed necessary within the corporation; to fix and establish the grades of all streets, alleys, avenues and thoroughfares; they also have the power, supervision and control over the construction, repairing, cleaning, lighting and heating of all public buildings, and over all public improvements of the city. They shall have exclusive power to make all improvements and expenditures, within the revenue limits allowed by the council, which shall cost less than five hundred dollars, but shall let all contracts over fifty dollars to the lowest responsible bidder after due advertising. *The said board shall have the exclusive power to organize and control* the fire department, the workhouse, the hospital, the alms-house, the city prison, and *such works as the city may own for supplying the city or the inhabitants thereof with water, light, heat or power.*"

* * * * * * *

Three things are authorized by the above quoted sub-section 5 of section 3290, namely :

(1) To provide the city and the inhabitants thereof with water service, light service, etc.

(2) To make regulations for the management thereof ; that is, to make regulations for the management of the water service, light service, etc.

(3) To fix and regulate the prices to private consumers and customers. That is, to fix and regulate the prices for the water service, light service, etc., rendered to private consumers and customers.

The first clause of this sub-section grants power to provide the city and its inhabitants with water and light service. The city may do this by works of its own and it may also do it or have it done by contract with some other corporation or person. It is not perceivable how the water and light service can be provided for the city and its inhabitants except by one or the other of these two modes. If the city does not provide this service by works of its own, it cannot provide or procure the service otherwise than by contract with some other corporation or person. Water works and gas works cannot be built in the city, and the pipes and mains laid in the streets and public places without a grant from the city. Sub-section 35 of section 3290, Kentucky statutes.

The second clause or sentence of sub-section 5 while it relates to the general subject and the objects mentioned in the first clause, confers separate and distinct powers upon the common council, namely, power to regulate the management "thereof," and "to fix and regulate the prices to private con-

sumers and customers." The word *thereof* plainly has reference to the object which the city was authorized by the first clause to provide, that is, water service, light service, etc., and to fix and regulate the prices to private consumers and customers thereof. The legislature cannot be supposed to have done the useless thing of authorizing the city to fix the price of water and light to private consumers furnished from its own works. That power it would necessarily possess if it had power to furnish water or light. The power to manage and control *works of its own* is given in very broad and explicit terms by section 3438 above quoted, and it cannot be supposed that the legislature intended to *twice* grant to the municipality the same power to manage works of its own. From this fact, as well as from the terms used in the grant, it seems obvious the legislature meant to empower the cities to manage the operation of such works as they might own by section 3438, and by sub-section 5, of section 3290, to fix and regulate prices of works not owned by them but by private corporations. Effect ought to be given to all parts of the charter, and no part of it held nugatory.

The court will take judicial notice of the fact that at the time of the passage of this act for the government of cities of the third class, some of them owned water plants, gas plants and electric light plants. For example, the city of Henderson at that time owned its gas, electric light and water plant, the plants being the property of the municipality, and Bowling Green owned its own water works plant. The City of Owensboro, on the other hand, did not then own either a water plant, gas plant, or an electric light plant, though it now owns an electric light plant. Some of the other cities of the third class own

their own plants, while others do not, for supplying light and water.

The legislature, therefore, was providing in the charter for both conditions, that is, for conditions existing in those cities that owned their own plants, and also for conditions existing in those that did not. It is perfectly obvious that sec. 3438, *supra*, provides for the management and control of those works for supplying water, light, etc., which are owned by the municipalities, while sub-section 5 was intended to empower such municipalities as did not own their own plants to provide the city and the inhabitants thereof with water and light, either by works of its own, or by contract, as it might deem best under the circumstances in which the city found itself, and then the power was conferred to make such regulations, that is, police regulations for the management thereof as the public health, public convenience, etc., might require, and also to fix and regulate the prices to be charged by the owners of such works for the rendition of such service to private consumers and customers.

At the time of the passage of the charter for cities of the third class in Kentucky the City of Owensboro had a contract with the appellee to furnish water for the extinguishment of fires, and hydrants for that purpose are placed at the designated points about the city. The rental for these hydrants amounts annually to $7,400, payable quarterly. This service is rendered to the municipality as such and is paid for out of the city treasury. Similar contracts then existed and still exist at Paducah and Frankfort.

The appellee is the only water company at Owensboro, and it has not only a virtual, but by reason of that fact, an absolute

monopoly of the business of supplying water for public and private use in the city. The same state of fact exists at Paducah and Frankfort. The power to regulate the management of water service and to fix and regulate prices to private consumers and customers was conferred for the protection of the public and to prevent injustice, oppression and extortion.

This legislation creates and establishes no new principle of law, but gives effect and application to an old one. The power of restraining monopoly and regulating the prices and charges or exactions that might be made or taken by those having a monopoly, whether such monopoly was created by a grant from the King or by force of circumstances, where the businesss is affected with a public interest, existed by the common law of England, which, together with all statutes of Parliament made in aid of the common law prior to the fourth year of King James I, and which are of a general nature and not local to the kingdom, was adopted by an ordinance of Virginia in May, 1876 (Hening's Statutes at Large, vol. 9, p. 127.) And that ordinance has been substantially embodied in every constitution adopted by the state of Kentucky. This principal of the common law is illustrated by the declaration of Lord Hale, as follows :

> " If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen . . . . . *or because there is no other wharf in that port*, as it may fall out where a port is newly erected ; in that case *there cannot be taken arbitrary*

and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences *are affected with a public interest, and they cease to be juris privati only.*"

See also the opinions of Lord Kenyon in Bolt v. Stennett, 8 T. R. 608, and of Lord Ellenbrough in Allnutt v. Inglis, 12 of Easts Reports, 538, 539, and of Chief Justice Waite in Munn v. Illinois, 95 U. S. 123, 136; and Nash v. Page, 80 Ky. 539.

The power is traceable back to the general principles of the common law, brought to this country by our ancestors and expressly declared or adopted by the state of Virginia, which then included not only Kentucky, but the great northwest territory, and subsequently embodied in the organic law of the state of Kentucky. The power of regulating the conduct of the business and fixing the prices to be charged for services rendered exists, therefore, *in all cases where there is a monopoly by grant or circumstances and* [*or*] *where property is so employed as to be affected with a public interest.* Munn v. Illinois, 94 U. S. 113; Spring Valley Water Works, v. Schottler, 110 U. S. 348, 353, 354.

Such is the law of the state of Kentucky and the source of it, and intimation of doubt by the court below of the constitutional power of the legislature of the state to delegate authority to the municipality to enact the ordinance, was matter of surprise. The power to enact the law, for the ordinance is a law, must be either exercised by the legislature of the

state in the first instance, or it must delegate a portion of its legislative power for that purpose to the municipality, or to some board or tribunal. The power of the legislature to delegate to the municipal legislature a sufficient part of the legislative power of the state to enact the ordinance and all other needful local laws, cannot be doubted. Dillon on Mun. Corp. (4 ed), sec. 308; Lord Abinger's opinion in Hopkins v. Swansea, 4 M. and W., 621, 640; Des Moines Gas Co. v. City of Des Moines. 44 Iowa, 505, S. C. 24 Am. Rep. 758; Taylor v. Carondelet, 22, Mo. 105; 17 Am. and Eng. Ency. Law, 230, Horr & Bemis Pub. Ordinances, sec. 2; Milne v. Davidson, 5 Martin 409, 16 Am. Decs. 189; and Murphy v. Louisville, 9 Bush 196-7. In the case cited Judge Pryor says:

> "A public corporation is subject to the control of the government from which it derives its existence, and is in fact a part of the government itself, created for the purpose of aiding in sustaining and enforcing the rules, regulations, and laws so indispensible to every municipal government. These corporations are created for public purposes, and may be abolished or altered at the will and pleasure of the power creating them. The charter creating the present corporation (the city of Louisville) vests the legislative departments of the city government with the power to enact laws for the purpose of promoting the welfare and advancing the interests of those living within its corporate limits. These laws, when in accordance with the city charter, and not in conflict with the state or Federal constitutions, are to be respected and obeyed by all those subject to the municipal government. The laws or ordinance are made public, and apply to all within the boundary of the corporation."

III. Power to make all necessary police regulations for the security and protection of the general health, comfort, convenience, morals and safety of the public and to define, declare, prevent and suppress and remove nuisances within the city is conferred in the broadest terms by several provisions in sec. 3290, especially sub-section 16, Ky. Stats.

Regulation is a subject together with the fixing of prices for services rendered by public utilities that has occupied the attention of possibly every legislature of every state in the union for the last twenty or thirty years; certainly since the decision of the Supreme Court in the Munn case and other cases of a similar character reported in 94 U. S. Fixing freight rates and especially the price to be paid by private consumers of water and light, is now authorized by the laws of probably every state in the Union. The statutes authorizing such regulation and conferring powers to that end upon boards and other tribunals, and upon the governing bodies of municipalities, are remedial in their nature, enacted for the security and protection of the general public, and should receive a liberal construction by the judicial tribunals.

They ought not to be confined in their operation and effect to the strict letter, but extended and applied to all cases within their purview and spirit.

Railroad companies, turnpike companies, street car companies, water companies, gas companies, electric light companies, public warehouse companies, etc., are all public utilities in which the owners have embarked their money and property in occupations "affected with a public interest," whereby "it ceases to be *juris privati* only." Such corporations perform functions and duties which are public in their nature and char-

acter and belong to the state; duties which the state might primarily perform for the public. They have conferred upon them the privilege of exercising the power of eminent domain. Corporations organized for the purpose of conducting any business above mentioned, are not private corporations, but are *quasi* public corporations and their officers are consequently *quasi* public functionaries. The property they own and use in conducting the business is in a just sense held in trust for the benefit of the public. ALL THAT SUCH CORPORATIONS HAVE A RIGHT TO EXACT FROM THE PUBLIC FOR THE SERVICES RENDERED IS THE LEGITIMATE AND NECESSARY EXPENSE OF OPERATION AND A MODERATE RETURN UPON THE FAIR VALUE OF THE PROPERTY EMPLOYED BY THEM IN THE PUBLIC SERVICE. In so far as the shares of stock issued actually represent money or property put into the corporation at a fair valuation, they are valid. If any stock has been issued otherwise, it is as to the public, without warrant of law, fraudulent and void. If mortgages have been made and bonds have been issued and distributed among the stockholders or sold and the money divided among them, the same not going into the corporation, such transactions are in violation of the trust, are an abuse of the power to create indebtedness, and the mortgage and the bonds are also fraudlent and void as to the public. See Judge Black's argument before the Pennsylvania Senate, published in the "World's Best Orations," edited by Justice Brewer, vol. 2, pp. 471, 480; Beach on Pub. Corps, Secs. 2 and 3; Miners Ditch Co. v. Zullerbach, 37 Cal. 543; Munn v. Illinois, 94 U. S. 113; Smyth v. Ames, 166 U. S. 544.

This is sound doctrine and the just rule to be applied as be-

tween the public and such corporations, or as between the public and the holders of such stock or such bonds, however it may be as between the corporation and the holders of such stock or bonds. This principle has been very fully recognized and applied. For example, Judge Clark said in his opinion in the case of the New Memphis Gas and Light Co. v. the City of Memphis, 72 Fed. 955, in considering the question of whether certain rates prescribed by the local authorities were just, and in discussing the elements to be considered in fixing such rates:

> "The company has a right to such gross income from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges, *so far as bonds and securities represent an expenditure actually made in good faith*, and also pay a reasonable dividend on stock, *so far as this represents an actual investment in the enterprise.*"

And the same rule was announced by Judge Woolson in considering the reasonableness of rates in the Capital City Gas Light Co. v. City of Des Moines, 72 Fed. Rep. pp. 842, 823, 846.

In Smyth v. Ames, 169 U. S. 544, Justice Harlan in delivering the opinion of the court, said:

> "If a railroad company has bonded it property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the

purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged."

And the same judge delivering the opinion of the court in the Covington Turnpike Co. v. Sanford, 164 U. S. 597, discussing the question as whether the rates prescribed were reasonable, said:

"That the inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise."

In San Diego Land Co. v. National City, 174 U. S. 757, the court said:

"The basis of calculation suggested by the appellant is however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, *is a fair return upon the reasonable value of the property at the time it is being used for the public.* The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which

went into the plant may be in excess of the real value of the property."

Many other cases might be cited recognizing the principles here contended for, namely, that only the fair and legitimate expenses of operation and a reasonable return upon the actual value of the property employed in the service and the nature or value of the service should be considered in fixing rates of charges for services rendered by these public corporations. This rule necessarily excludes from consideration such stock and such bonds as have been issued not representing money or property actually paid into or received by the corporation.

We think it may safely be asserted that no court, in a contest between the public and such a public or *quasi* public corporation, has ever given any recognition to such stock or such bonds. After a diligent search no such case has been found, and we presume none can be, because, if recognition were given to such stocks and bonds, it would utterly defeat all attempts by the authorities to regulate prices to be charged for service rendered to the public. It would enable the corporations to pile up such a mountain of fictitious stock and debt as would render extortion necessary and legitimate.

Persons proposing to organize corporations for operating water companies, gas or electric light companies, or street car companies, go into some thrifty town or city. They obtain the necessary consent of the municipal authorities. They expend fifty or a hundred thousand dollars, and erect their plant and put it into operation. By force of circumstances they have a

monopoly in the town as complete as if the grant were exclusive. Two such concerns cannot live in the community. Soon it is discovered they have a gross income sufficient to pay operating expenses, taxes, etc., and have left a sum equivalent to interest at the rate of four, five or six per cent. on three or four times the actual cost of the plant. Then various schemes are adopted. Sometimes the stock is increased and taken pro rata by the original stockholders and sold ; sometimes mortgages are made and bonds issued and divided among the stockholders and these bonds sold, the stockholders and not the corporation realizing the money for the stock or bonds. In order to pay dividends on this stock or pay interest on the bonds and create a sinking fund, rates and charges for the service are kept at the highest point. If the exhorbitant rates are not paid, the water or gas or electric light or telephone is " cut off." The scheme described is common to the whole country. It is nothing more or less than a fraud on the public. Instead of issuing stock or bonds, representing not money paid into the corporation but put into the pockets of the corporators, the rates or prices for the service rendered ought to be reduced. These companies have no warrant of law for issuing any stock except for money paid in or properly delivered to the corporation at a fair valuation. Under the power to create or contract indebtedness no power exists for executing a mortgage and issuing bonds for the purpose of enriching the stockholders. Such stock and bonds are void into whosoever hands they may come, because not authorized by the charter, and because prohibited by general principles of justice and law. The fact that such documents may be made negotiable in form does not protect them, " for it is to be kept in

mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued." "And this applies to every person who takes the paper afterwards." The Floyd Acceptances, 7 Wallace, 676.

There are but two remedies for these wrongs known to the law: Regulation or municipal ownership. The first is difficult. These schemes are not usually executed by bunglers, but by skillful persons "learned in the law." The general outline only has been mentioned. All details are worked out with the greatest care and skill. All the elements of contract are employed. Sometimes, for example, as in the present case a new corporation is organized by the stockholders, and the property "sold" and "conveyed" by the "old" to the "new" corporation, for a large consideration in stock and bonds. Nothing on the face of the papers could have a greater appearance of honesty and fair dealing. Are not such schemes unlawful and void; and is not *this* scheme void? The Owensboro Water Company, appellee's "predecessor" and "assignor," was organized September 10, 1878, for a period of twenty-five years under chapter 56, Gen. Stats. Ky. It built a plant for furnishing water to the city and the inhabitants. It entered into a contract with the city for the rental of hydrants and operated its plant until May 30, 1889, when the same persons who owned the stock in the old company, with others, organized the appellee, the Owensboro Water Works Company, and then the property, franchises, contracts, etc., of the old company were sold and conveyed to the appellee for $295,000.00 in stock and $200,000.00 in bonds delivered by the latter to the former.

There was no law of the state authorizing such a transaction as this—no law authorizing any *quasi* public corporation to sell, assign or transfer its franchises or property.

Noyes, on Intercorporate Relations, says:

"Sec. 135. It is a rule applicable to all corporations exercising public franchises that such franchises can be transferred only by and with the consent of the state which granted them—that corporate franchises are incommunicable without legislative authority.

The courts have assigned various reasons for the existence of the rule, of which the following are based upon principles fundamentally sound:

1. The charter of a corporation is the measure of its powers. Unless authority to transfer its franchises is expressly granted, such an act is *ultra vires.*

2. The transfer by a corporation of its franchises—disabling it from the performance of its public duties—is *against public policy.*

3. A corporation exercising public franchise is an agent of the state, and, without the consent of the state, cannot *delegate its powers.*"

Citing many cases, among them,

Railroad Co. v. Winans, 17 Howard, 30;

Central Transfer Co. v. Pullman Car Co., 139 U. S 24;

L. & N. R. R. Co. v. Kentucky, 161 U. S. 692;

Brunswick Gas Light Co. v. United Gas Co., 85 Maine, 532, 35 Am. St. Rep. 385;

Oregon Ry. v. Oregonian Ry., 130 U. S. 1;

R. R. Co. v. Hooper, 160 U. S. 524;

Beach on Corp. Vol. 2, Secs. 831-856;

If contrary to public policy, if *ultra vires*, if void, no recognition by the city could impart validity to it.

There is always great difficulty in presenting the real facts to the court. Attempts at regulation are always assailed as populistic or agrarian in spirit. Possibly such motives sometimes operate on the minds of boards, tribunals, or bodies empowered to fix rates, but doubtless they more often do not. Nothing is better known to men of average intelligence than that there exists nowhere in the state power to deprive any person of property without compensation and without due process of law. An effort to accomplish such a purpose would inevitably prove utterly futile. It would be contrary alike to justice and the law of the land.

The just and true rule to be applied in this case, and all similar cases, the rule supported by reason and by the decisions of this court is simply this: *The rates should be so adjusted as to enable the company to pay, all its legitimate operating expenses; and yield a fair return to the owners on the just value of the property employed in the public service.* We repeat, on the just value of the property embarked in the business; nothing on fictitious capitalization: whether represented by stocks or bonds.

This is the whole extent of the right of these corporations, and it is conceded. They are public or *quasi* public corporations. Their property is affected with a public interest. They are performing public functions. They have a right to charge for services rendered just compensation. But the public to whom the service is rendered also have rights of property which are as much entitled to protection and are as sacred as theirs. Every dollar

extorted from the people for services rendered in excess of what may be charged under the rule above stated is just so much of their money "taken" without just compensation, that is, without the equivalent in services rendered and is therefore under the form and pretense of law and right mere spoliation.

The Fourteenth Amendment granting the equal protection of the laws and prohibiting the deprivation of property without due process of law is invoked for *their* protection.

In Regan v. Farmers' Loan and Trust Co., 154 U. S. 399, this court said:

> "The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking and destruction of private property, legally acquired and legally held."

In Smyth v. Ames, 169 U. S. 466, the court said:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public con-

venience. ON THE OTHER HAND, WHAT THE PUBLIC IS ENTITLED TO DEMAND IS THAT NO MORE BE EXACTED FROM IT FOR THE USE OF THE PUBLIC HIGHWAY THAN THE SERVICES RENDERED BY IT ARE REASONABLY WORTH."

And in Covington Turnpike Company v. Sandford, 164 U. S. 596-7, this court said:

"When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * * *

The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates

established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise."

IV. We have attempted to show to the court, that there was and is ample legisative power to pass the ordinance fixing maximum prices and charges for water furnished to private consumers in the City of Owensboro. If, however, there was not such power, then it is contended that the court below on the authority of the decision of this court in the case of the Hamilton Gaslight and Coke Co. v. Hamilton City, 146 U. S. 265, and the authorities cited by the court, should have dismissed the case. A brief quotation is made from the opinion of the court in that case, as follows:

"The plaintiff's first contention is that there is no statute of Ohio authorizing any city, in which there are already gas works in full and complete operation, to erect gas works, or to levy a tax for that purpose. It this were conceded, we should feel obliged—the plaintiff and defendant both being corporations of Ohio—to reverse the judgment, and remand the cause with directions to dismiss the suit for want of jurisdiction in the circuit court. The jurisdiction of that court can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an

ordinance to which the state has not, in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. Murray v. Charleston, 96 U. S. 332, 440; Williams v. Bruffy, 96 U. S. 173, 183; Lehigh Water Co. v. Easton, 121 U. S. 388, 392; N. O. Water Works v. Louisiana Sugar Co., 125 U. S. 18, 31, 38. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States."

V. The appellee contends that there exists a contract between it and the City of Owensboro whereby the city is precluded from fixing rates of compensation for water furnished to private consumers thereof. This claim of contract is based upon the following sections of the ordinance of September 10, 1878, to-wit:

"Sec. 9. The said company shall have the power and authority to make and enforce as part of the condition upon which it will supply water to its customers, all needful rules and regulations, not inconsistent with the law or the provisions of this ordinance.

Sec. 10. The said city will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition, and against injury to the hydrants rented by it to said city, and against waste of water by consumers."

It seems obvious that no contract exists by virtue of these sections. There is no evidence in the sections above quoted of any intention on the part of the municipality to surrender the power to fix rates for the price of water. The language used is very general, and it is plain that rates for water was not included or intended to be included by the words used. No reference was made to the subject even in the most remote way.

In Stone v. Farmers' Loan and Trust Company, 116 U. S. 307, the act of the legislature of the state of Mississippi, incorporating the railroad company, provided that the company should have the right, "from time to time, to fix, regulate and receive, the tolls and charges by them to be received for transportation of persons or property," did not amount to a contract, and that nothing therein contained prevented that state of Mississippi, afterwards through a commission, from prescribing rates for the transportation of persons and property. The opinion of the court was delivered by Mr. Chief Justice Waite. On page 330 it is said :

> "In Munn v. Illinois, 94 U. S. 113, and C. B. & Q. R. R. Co. v. Iowa, 94 U. S. 155, this court decided that, as to natural persons and corporations subject to legislative control, the state could, in cases like this, fix a maximum beyond which any charge would be unreasonable, and that such maximum when fixed would be binding on the courts in their adjudications, as well as on the parties in their dealings. The claim now is that by section 12, the state has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to deter-

mine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the state had in the matter before the charter it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention."

And in the case of the Winchester Turnpike Company v. Croxton, 96 Ky. 738, it was claimed by the company that a contract existed between the company and the state under the provisions of the charter, by which the power to regulate and fix rates of toll for travel on the road, by the state, has been surrendered.

Section 15 of the charter provided in substance that it should be lawful for the turnpike company to collect from persons using the road the tolls thereinafter mentioned, and to stop any person until they had paid tolls according to the rates prescribed, to-wit: For every twenty head of sheep, hogs or other small stock, 6¼ cents, etc.

And by section 21 it was provided that if it should at any time appear that a clear income and profits will not yield a dividend of six per centum on the capital stock, it should be lawful to increase the tolls so that a dividend of six per centum could be earned. And it further provided if by the abstracts to be furnished it should appear that the profits yielded a dividend exceeding twelve per cent. then the tolls should be reduced so as to reduce the dividend to twelve per cent. per annum.

By section 20 the company was required once in each year to lay before the general assembly an abstract of its accounts, showing the amount of their capital stock expended in the prosecution of their works and of their income and profits arising from tolls during the respective periods, together with an abstract of the accounts of the costs and charges of keeping the road in repair and other contingent costs and charges and such other information as might be necessary to the end that the clear annual income and profits might be ascertained and known. (pp. 742-743.)

The court said that the question before them was whether the company had a contract with the state, entitling it to collect the tolls fixed in its charter of 1834, in spite of the legislative act of the year 1893, fixing uniform rates for all turnpikes in the state and which are less than those fixed in the company's charter. The court, after reviewing several cases decided by the Supreme Court of the United States and several state decisions, decided that the provisions of the charter of 1834 did not constitute a contract and that the subsequent rates were valid and binding upon the company.

See, also the case of the City of Danville v. Danville Water Company, 178 Ill. 309. S. C. affirmed 180 U. S. 697.

From these cases it seems quite clear that there was no surrender of the right to prescribe rates and that no contract to that effect was made.

Sections 9 and 10 above quoted, are contained in an ordinance of the City of Owensboro granting the right of way in the streets, etc., to the Owensboro Water Company, a corporation which, it is contended by appellee, is not now in existence, and which, it is also contended, assigned to the complainant company, its franchises, its property and property rights.

There is not now, nor has there ever been any general law of the state authorizing any *quasi* public corporation to assign its franchise or its property to another corporation. Chapter 56 of the General Statutes of Kentucky, under which the corporation was organized, contains nothing authorizing such action by any corporation organized under its provisions.

This corporation exercises public functions, it is an agency of the state, the law under which it was created and exists is the measure of its powers. The alleged assignment of its franchises and transfer of its property to the appellee is contrary to public policy, ultra vires and void. L. & N. R. R. Co. v. Kentucky, 161, U. S. 692; Brunswick Gas Light Co. v. United Gas Co., 86 Maine, 532, S. C. 35 Am. St. Rep, 385 and note; Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24; Noyes Int. Corp. Relations, secs. 135-139.

If there had been such contract it would not nave been transferable: Railway v. Gill, 156 U. S. 656.

VI. The validity of the ordinance is questioned in the bill on the ground that the water company was not notified of the meetings of the committee appointed by the common council to

make an investigation and report an ordinance to the council, or the meetings of the council.

In the first place, the statute and laws under which the council was proceeding, do not require notice to the water company of the meetings of the committee or of the council. And in the next place, it is shown that the president of the water company had heretofore declined to furnish any information to a former committee appointed by the common council, or to the common council, and has declared that the company would not furnish any information as to the cost of the plant, or the amount of its income and expenses of operation, or the value of its property, etc.

Unless notice is required by the statute under which the local board or tribunal is proceeding for the purpose of fixing rates none is necessary. This has been determined in several cases, notably the Spring Valley Water Works Co. v. the City and County of San Francisco, 82 Cal. 286, 16 Am. Stat. Rep. 117; San Diego, etc. Co. v. National City, 74 Fed. 81, S. C. 174 U. S. 739-760.

In the case, 82 Cal. 286, the charge was made that the board of the municipalities had acted arbitrarily, without investigation and without the exercise of judgment or discretion without reference to what should constitute just rates, without reference either to the expense involved in furnishing the water or to what was a fair and reasonable compensation therefor, and that the action of the board in fixing the rates was a palpable fraud.

The court, however, found against these contentions of the water company. The case is an important one not only on the

question of notice, but on other questions involved in this case. The subject of the power to fix rates and the various considerations entering into the regulation of rates, are examined and discussed, and a great number of cases, including several supreme court and federal court cases, are cited.

VII. In the San Diego Land and Town Company, 74 Fed. Rep. 79-86, the question of notice was fully considered by Circuit Judge Ross, and it was there held to be unnecessary. This case involved a consideration of many questions involved in the present case. The court went into an elaborate consideration of the proper basis for determining rates and of what constitutes reasonable rates. The bill was dismissed and the case was taken into this court on appeal; the opinion is published in 174 U. S. 739-760. The decree dismissing the bill was affirmed.

Mr. Justice Harlan, who delivered the unanimous opinion of the court reviews many preceding cases on the subject of regulation and rates, After holding that the company was not entitled to formal notice as to the day upon which water rates would be fixed by ordinance, he enters upon a discussion of the principles that should govern municipalities in determining rates, and we quote as follows:

> "That is was competent for the state of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county or town, or to the inhabitants thereof is not disputed, and is not, as we think, to be doubted. It is

equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the state cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for the use. That would be a deprivation of property without due process of law. Chicago, Burlington, &c. Railroad v. Chicago, 166 U. S. 226; Smyth v. Ames, 169 U. S. 466, 524. But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use. Chicago & Grand Truuk Railway v. Wellman, 143 U. S. 339, 344; Reagan v. Farmers' Loan & Trust Co., 154 U. S, 362, 399; Smyth v. Ames above cited. See also Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 614, 615.

"In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights

secured by the Constitution of the United States, a judicial question arises, and the courts, federal and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it is unmistakably repugnant to the fundamental law.

"What elements are involved in the general inquiry as to the reasonableness of rates established by law for the use of property by the public? This question received much consideration in *Smyth v. Ames*, above cited. That case, it is true, related to rates established by a statute of Nebraska for railroad companies doing business in that state. But the principles involved in such a case are applicable to the present case. It was there contended that a railroad company was entitled to exact such charges for transportation as would enable it at all times, not only to pay operating expenses, but to meet the interest regularly accruing upon all its outstanding obligations and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to *all* those ends would be a deprivation of property without due process of law, and a denial of the equal protection of the laws. After observing that this broad proposition involved a misconception of the relations between the public and a railroad corporation, that such a corporation was created for public purposes and performed a function of the state, and that its right to exercise the power of eminent domain and to charge tolls was given primarily for the benefit of the public, this court said: '*It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of per-*

sons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the service rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad company has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged.' 169 U. S. 544. In the same case it was also said that 'the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its stock and bonds, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. *What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience, on the other hand what the public is entitled to demand is that no more be exacted from it for the use of a*

public highway that the services rendered by it are reasonably worth.' 169 U. S. 466, 546.

This court has previously held in Covington & Lexington Turnpike Road Company v. Sanford, 164 U. S. 578, 579, 598—which case involved the reasonableness of rates established by legislative enactment for a turnpike company —that a corporation performing public services was not entitled, as of right and without reference to the interests of the public, to realize a given per cent. upon its capital stock; that stockholders were not the only persons whose rights or interests were to be considered; and that the rights of the public were not to be ignored. The court in that case further said: 'Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprive the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receives what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public.'

These principles are recognized in recent decisions of the supreme court of California. San Diego Water Co. v.

San Diego (1897) 118 Cal. 556; Redland's Domestic Water Co. v. Redlands (1898), 53 Pac. Rep. 843, 844.

The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating its plant, including interest paid on money borrowed and reasonably necessary so be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. THE BASIS OF CALCULATION SUGGESTED BY THE APPELLANT IS, HOWEVER, DEFECTIVE IN NOT REQUIRING THE REAL VALUE OF THE PROPERTY AND THE FAIR VALUE IN THEMSELVES OF THE SERVICES RENDERED TO BE TAKEN INTO CONSIDERATION. WHAT THE COMPANY IS ENTITLED TO DEMAND, IN ORDER THAT IT MAY HAVE JUST COMPENSATION, IS A FAIR RETURN UPON THE REASONABLE VALUE OF THE PROPERTY AT THE TIME IT IS BEING USED FOR THE PUBLIC. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

One of the most elaborately considered cases to be found in the reports of the U. S. circuit courts is that of the Capital City Gaslight Co. v. the City of Des Moines, 72 Fed. 829-850. The opinion was delivered by Judge Woolson. The whole subject is examined in all its phases and almost every case decided by this court up to the time the opinion in that case was delivered is examined or cited. It is especially valuable in its discussion of the various facts which ought to be taken into consideration in fixing rates. The opinion is quite elaborate but it is unnecessary to make quotations from it; it is deemed sufficient to say that it will repay a careful examination.

There is another very valuable case in the same volume: New Memphis Gas and Light Co. v. City of Memphis, 72 Fed. Rep. 933-957.

SUMMARY OF EVIDENCE.

VIII. Having attempted to state the principles of law which it is supposed must be applied in this case, we now come to a consideration of the case as made by the evidence.

The evidence, aside from the exhibits filed, for the appellee consists of the depositions of fourteen witnesses, which are printed in the record, on pages 67 to 180, and in rebuttal pages 288-293.

The evidence offered by the appellant consists of the deposition of eight witnesses, printed on pages 188 to 287 of the record, and the affidavit of Sturtevant filed as part of his deposition on page 282 and also certified copies of certain documents, seven in

number, being the reports made by the appellee to the state auditor, which are printed on pages 294 to 316.

The salient points in the evidence offered by appellant is summarized as follows :

1. Geo. B. Sidelinger (p. 67) of Danville, Ill., has been an employe for eight years of the Danville Water Co., a corporation owned by the same persons substantially as own the appellee company. He visited Owensboro April 2 or 3, 1900, to make an affidavit to procure a temporary injunction; he looked over the plant, found it in good condition, gives his judgment that it would cost $235,000 to $250,000 to replace or duplicate the plant, gives no details; estimates wear and tear two and one-half to three per cent.; it is customary to collect rates in advance; thinks the Owensboro ordinance would ruin the company; thinks running expenses of the plant, apart from interest, would be ten or twelve thousand dollars; is not familiar with company's income; thinks rates under ordinance too low.

The cross examination (p. 70) discloses that the witness knew next to nothing, very little, of the plant at Owensboro; did not know what real estate it owned, the quantity or size of the pipe in the system, could not state quantity of pipe of different sizes. He is not an engineer and no technical training. He was asked questions intended to test his knowledge of the value and cost of laying the pipe in the system, but he was unable to answer. He admits the wear was not as great as he had stated. He testifies that he got his information from officers of the company as to cost of operation; bases his estimates on his experience at Danville, Ill. He states on re-direct examination that he was called to Owensboro more especially in regard to machinery and pipes, outfit, etc.

Edward Hughes, (p. 81) chief fire department, at Louisville, Ky., was at Owensboro in April, 1900, thinks system at Owensboro furnishes sufficient fire protection; knows nothing of the pipe system or the size of the pipe, saw plant in operation at a test made twenty years ago on one occasion.

William J. McGonigale (p. 83) lives at Louisville, Ky., is the auditor and treasurer of the Danville Water Co., Danville, Ill., Owensboro Water Works Co., Defiance Water Works Co., and Frankfort Water Co., Frankfort, Ky., and has been since 1897; values Owensboro plant at $235,000 to $250,000; is able from his official position in connection with appellee to state cost of operating the plant, and puts the cost at $13,000; that the plant is in splendid condition; states generally that its taxes have ranged from $2,500 to $5,000 at different times; has examined the ordinance of the city fixing the rates and says they are below the average of rates, and does not think the company could operate satisfactorily or successfully on that basis; says the revenue under the ordinance from private consumers would be reduced fifty per cent. below the rates now charged by the company; that the company receives now $7,595 on rent of hydrants; states that the net annual loss to the company operating under this ordinance would be $5,600 if all the water service could be collected; that the company has never paid any dividends to stockholders; that it lost last year $3,000 in operation; that the company would receive under the ordinance from domestic service $11,500 and in addition from hydrant rentals, $7,595; estimates operating expenses at $13,000, taxes, $2,500, and depreciation $9,000; estimates loss from domestic service in the neighborhood of twenty per cent.

On cross examination (p. 89) stated he was thirty-two years of age; had been clerk in a bank, in a wholesale grocery, an insurance agent, and then took employment with the water companies; states the capital stock of the appellee to be $355,000 divided into 3,550 shares and gives partial list of stockholders, but declined on advice of the company's lawyer to give a full list of the stockholders. States the bonded indebtedness of the company to be on September 15, 1899, $235,000 or $236,000, and states the floating debt of the company to be $20,000; says the gross income of the company for 1899 was about $29,000; that for the year ending June 30, 1899, $29,764.29; and for the year ending June 30, 1900, that his books showed a gross income of $31,577.43; that the salaries and wages paid for the year 1899 by the company was $4,139.32; that the company received from hydrant rentals $7,384.57, and gives the statement of the salaries paid to some of the officers more in detail; that the company paid in taxes during the year 1899, $2,536.60, and in the year 1900, $1,122.75, but had not paid all of the taxes due for that year; that during the year ending June 30, 1899, company paid for fuel $899.49, and for the year ending June 30, 1900, $893.75; and that there were some other expenses for stationery and office rent at Owensboro. His attention is called to the reports made by the company under chapter 109 Art. 3, Ky. Stats. to the state auditor, wherein the tangible property, pipe system, pumping station machinery for pumping station, tolls, hydrants, lot on which pumping station is erected and vacant lot in Owensboro and three acres of land in Daviess county, was valued under oath at $75,000 and asked to state whether it was approximately correct, but declined to say whether it was correct or not;

that it was made by the president, D. Long Miller, who was then in Louisville, where the depositions were being taken; states that he has no books or records in his possession that will show the original cost of constructing the plant built in 1879, and has no knowledge where the books of the Owensboro Water Co. are; that he had never seen any statements of the original costs of the plant, nor any record or any statement of the cost of the company up to the time of the organization of the present company and had no knowledge or information as to the cost of the water works plant at the time it was transferred to the present company; that the annual interest on the outstanding bonds of the company June 30, 1899, amounted to $12,064.95. When asked whether he had any such experiences as would enable him to state to what extent consumption of water would be increased by a reduction of say of thirty-three and one-third per cent. in rates, he answered that from his "knowledge of such condition the consumption of water would be increased to such an extent that the expense of operating the plant would be added too." That the company has no reservoir and no standpipe, and no means of storing water; that he is not a graduate of any school of engineering or water works architect and never superintended the construction of any plant; could not state the number of miles or feet of pipe in the plant at Owensboro; thinks there is approximately 110,880 feet, or twenty-one miles in the system.

George J. Long (p. 103) estimates the value of the property of the company at Owensboro at $225,000 to $250,000; says the rates prescribed by the ordinance are too low; is asked what the effect of not collecting water rates in advance would be, and

says the company would lose considerably thereby; considers that the actual expenses of operating the plant at Owensboro $12,500, and estimates wear and tear at three and one-half per cent., but says that he got his estimate of operating the plant from statements made by Mr. McGonigale; that he visited the plant April, 1900.

Alfred Walker (p. 109) states that he is a water works and gas works contractor, and has been so engaged forty years; that he examined the water works at Owensboro two or three months previously; thinks the system adequate and that its fair value is $225,000 to $230,000.

On cross-examination (p. 110) stated that he was seventy-three years of age; that he was at Owensboro in April and made an affidavit; that he went over a good portion of the town; that he got a map from the company and examined it; he had no excavations made for examination of pipe. He was asked to state the average cost of laying a water works pipe system with pipe ranging from thirteen inches down to four inches per foot. He could not do this off-hand, he said. He was then asked to give the price of pipe, which he does, and to some extent the cost of laying pipe, and gives estimates. He never examined the plant but the one time.

Charles Hermany (p. 117) lives at Louisville and is a civil engineer. He has been engaged in water works business forty-three years at different points which he names; examined the water works system in April, 1900; found the system generally in good condition; examined the intake pumping station in 1883, and also in April, and also examined the maps of the water company; from the representation made to him and infor-

mation on that day he estimated the distributing water pipes, hydrants, gates, etc., at $120,000; the pumping station, machinery and appurtenances thereto belonging, I estimated upon that day as worth $110,000, total, $230,000; from representations made would say that the system was efficient for fire protection and furnishing water for domestic consumption. His statements were based upon representations made by the water works people; had examined the ordinance and his impression was that the company could not pay fixed charges under the rates.

On cross-examination (p. 119) says the Bowling Green plant was constructed in 1868 or 1869, and is owned by the city. He was then asked various questions as to proper plans for constructing water plants and give theories.

C. C. Hooper (p. 124) says he examined the smoke stack and buildings at the pumping station in April, 1900, and they were in good condition then.

William Rudd (p. 125) is an insurance agent at Owensboro; says insurance rates have been reduced since the plant was remodeled eight years ago.

On cross-examination (p. 149) he modified his statement that rates had been reduced by reason of the fact of overhauling the water plant; said it was due also to the good fire department maintained by the City of Owensboro, and thinks the rates at Owensboro are the same as those at Henderson, but knows nothing of the rates for insurance in the other third class cities of Kentucky.

Asa Williams (p. 129) states that he is thirty-five years old, lives in Owensboro, and is engineer of the Owensboro Water Works Co., and has been for seven years. He described the build-

ings and machinery, pipe system, etc., and files a map of the system, (page 150); says there is twenty miles of pipe ; states they have 1,000 "taps" 250 of which are not in use, and ninety-eight meters, which cost $7.50, $10 and $14 : the plant is operated day and night and requires two sets of hands, there being no reservoir ; the cost of operation he would say was $7,000 or $8,000 ; he files copy of the ordinance passed by the council; thinks reduces the rates from thirty to fifty per cent. ; that the pumping station was remodeled in 1890 ; considers the fire protection first-class.

On cross-examination (p. 141) he stated that the company had about 200 feet of 16-inch pipe, running from the pumping station to the intersection of Main and Triplett ; about 600 feet of 20-inch pipe, used as suction pipe from the river to the station, another suction pipe of fourteen inches ; there is in the system 5,645 feet of 12-inch pipe : he makes a calculation and makes it 5,523 feet and then 5,075, and finally fixes it at 5,600 feet ; that there is approximately 300 to 400 feet of 10-ich pipe ; 10,432½ feet 8-inch pipe, and that since April there has been 562 feet of 8-inch pipe put in ; that there was 60,100 feet of 6-inch pipe ; 29,075 feet of 4-inch pipe ; and 1,300 feet of 3-inch pipe ; and 200 feet of 2-inch pipe ; 163 hydrants ; does not know the number of valve boxes, but is between 100 and 200, and 103 water meters in operation ; and 1,627 "taps," of which 1,230 are in operation ; one 10-inch valve, four 16-inch valves, two 14-inch valves, one 12-inch valve, two 10-inch valves, eighteen 8-inch valves, about eighty-nine 6-inch valves, about sixty 4-inch valves, about three 3-inch valves. He was paid a salary of $1,200 in the year 1899, from January

1 up to July 1, he got $93 and some odd cents (?) per month, and from that time on $110 per month, and $15 per month for a horse; another employe, Woods, gets $50 per month; and another, Augustine, gets from $45 to $65 per month; thinks the coal used in 1899 cost $1,200, and that the coal cost from $1,100 to $1,200 per year, but says he don't know about that and cannot state; says that upon a neat calculation the reduction by the ordinance would probably be thirty-three and one-third to forty per cent. He was then asked what the effect would be assuming that the ordinance rates resulted in an increase of consumers of 40 to 50 per cent, whether the company's income would not be as great as under the company's rate; he thinks not, because running expenses would be greater; all he knows of the gross income of the company is from the auditor's statement; he was asked (p. 146, q. 134) "Is it not a fact that the officers of the company, to your personal knowledge, made a calculation as to the effect of this ordinance and ascertained from such calculation that the reduction would be equivalent to about one-third?" And he answered, Yes; and deducting hydrant rentals from the gross income of $31,000 per annum the ordinance would reduce the income of the company from private consumers down to $15,000 to $17,000 instead of $23,000. He estimates that the repairs cost from $2,000 to $3,500 per year; states the cost of pipe to be from $25 to $33 per ton.

Thomas Yeager (p. 148) has been connected with the Owensboro fire department for several years and since the remodeling of the water works system, pressure has been good at fires.

Henry Steubing (p. 149) is employed with the water works company at Evansville, Ind., and connected with water works business from 1876 to 1881, and from 1886 to 1888, and from 1891 and in 1900, and visited Owensboro in April, 1900, and then examined the engine house, boiler house, machinery, etc., and went over the map of the pipe system, and then estimated the value at $257,000 ; he has examined the ordinance of March, 1900, of the City of Owensboro and that the rates are lower than the rates collected in the city of Evansville.

On cross-examination (p. 150) he stated that the cost of repairing machinery increases as it grows old ; that the machinery at the station would probably amount in wear and tear to four per cent. per annum ; he did not examine the pipe system except to look at the map ; he estimates pipe at $30 per ton. He is shown a table prepared by Mr. William R. Reeder, civil engineer, member of the state board of engineers and of the American Water Works Association, giving the average cost of laying water pipe from actual experience in the construction of thirty different water works plants by him, the prices given in the table is the cost of laying different sizes of pipe, estimating the pipe at $30 per ton, including the cost of pipe, cost of lead, cost of hemp packing cost of excavation, drayage, refilling, pipe laying, cartage a distance of two miles, superintendence, and he states the cost of laying 12-inch pipe per foot at $1.56½, and he is asked to state whether these figures correspond with his experience and whether they are approximately accurate and correct in his opinion ; he answers that the figures given in the table are a very fair average, except that the pipe given in the table is a little lighter than the pipe now is, and he thinks the

cost of labor has advanced ; he says the increased cost on account of weight of pipe would probably be three and one-half to five per cent. ; the cost of pipe laid in the ground is given him from the table as follows: 4-inch pipe per lineal foot, forty-seven cents ; 6-inch pipe, sixty cents ; 8-inch pipe, ninety-three cents; 10-inch pipe, $1.26 ; 16-inch pipe, $2.30 ; 18-inch pipe, $2.70 ; 32-inch pipe; $4.20 per lineal foot ; and he answers that the table gives a fair average of prices except that pipe is now some heavier. He is asked that if by the provisions of the ordinance water rates may be collected in advance, as is contended by the city, would there then be any loss, and he says not, except the ordinary losses ; and says in answer to question when his attention is called to the provisions of the ordinance that it is limited in making collections for water service to those cases only where meters are attached, and that the company is not prohibited by the ordinance from securing the payment of the rates.

J. Tandy Ellis (p. 156) is vice-president of the water works company and had no notice of the passage of the ordinance except what he saw in the newspapers.

On cross-examination (p. 157) he stated that the ordinance was published in the papers ; that he knew the ordinance was pending in the council ; that he made no request of the council to be heard in any way ; that he did not offer the city or any of its officers any information on the matter : and that no member of the company as far as he knows, requested a hearing ; that he receives a salary of $100 per month.

Owen Ford, (p. 163) of St. Louis, Mo., a consulting engineer sixteen years estimates the value of the property at $245,000 or $250,000.

J. W. Holmes, (p. 167) manager of the United States Cast Iron Foundry Co., is now located at Bessemer, Ala., was engaged in construction of water works in 1884 and up to 1892, since which time he has engaged in manufacturing pipe and machiner or water works; has been familiar with water works system of Owensboro since 1889 in the employ of the company, and again examined the works in April, 1900; was engaged in making improvements in the water works system at Owensboro from 1889 forward about two years; describes the pumping station and capacity of the pumps; says the property is effective; estimates the value of the pumping station at $140,000 and of the distribution system at $140,000; considers the rates in the ordinance unreasonable and unjust; says the expense of operating the plant, including taxes and interest on bonds from 1889 to 1898 was about $26,000 per annum; thinks the ordinance fixing rates violates the original ordinance, secs. 9 and 10.

On cross-examination (p. 170) says he owns 950 shares of stock in the appellee company and gives other stockholders; has no knowledge or information as to the original cost of the plant; knows nothing of the books of the Owensboro Water Co.; his first connection with the company was in 1889, for the purpose of making recommendations regarding improvements to modernize the plant, and visited the works several times during the progress of improvement, and was employed several years at $500 per annum; at the time he associated himself with the company, the bonded indebtedness was $200,000 and $38,000 was issued and sold to cover cost of improvements and extensions.

Frank Scofield, (p. 183) water works engineer, New Albany,

Ind., has been engaged in constructing various water plants costing from $16,000 to $500,000; examined water plant in Owensboro in March, 1900; found it in very good condition; value the plant at $250,000; has examined the ordinance and finds the rates too low; says it would cost $25,000 per annum to operate the plant under economical management.

IX. The evidence offered by the appellant, the City of Owensboro, is summarized as follows:

Charles F. Sturtevant (p. 188) is thirty-eight years of age, and a resident of Chicago, Ill., and a member of the firm of Sturtevant & Todd, consulting engineers; is a graduate of the University of Maine; has been engaged in his professional work for fourteen years, and has designed and constructed and superintended the construction of twenty-one or twenty-two water works systems; visited Owensboro in April, 1900, and remained a few days, and afterwards in May, 1900, and remained four or five days; and on these visits made a thorough examination of the buildings and lots, boilers, pumping machinery, connections and the other parts of the plant, but made no excavations of the water main pipes in the streets, but ascertained from the maps and records of the company the number of feet of pipe and the different sizes in the water works system; he states that from the maps and data he found 400 feet of 20-inch pipe; 600 feet of 16-inch pipe, these two sections being on the suction side of the pump and laid into the river and composed the intake. Then in the distribution system proper we found 5,600 feet of 12-inch pipe, 300 feet of 10-inch pipe, 10,759 feet of 8-inch pipe, 60,100 of 6-inch pipe, 28,075 feet of 4-inch pipe, 1,300 feet of 3-inch pipe; this composing the amount of cast iron pipe in the

system, and 200 feet of 2-inch pipe. He was then requested to give an estimate, first of the original cost, second of the present value of the pipe, and third of duplicating the pipe at this time, and in doing so to state the value of it laid down in the ground, including excavations, lead, refilling, and all the cost of labor and material and including special castings. He says in answer that he ascertained as accurately as possible the prices of pipe supplies that prevailed at the several different times at which the plant was started and extensions made of it, and estimated the original cost of the original water main pipes, not including the suction pipes, from the pumps to the river at $70,000. This, however, does not include the valves, valve boxes and hydrants, but does include all labor, lead, hemp, etc., in laying the pipe in the ground as it is, complete, including excavations, refilling and all labor connected with laying it; and he estimates the total cost of the water main pipes, hydrants, valves, special castings, meters and taps, approximately as they existed at the time his observations were made, at $86,340. In answer to the second part of the question as to the present value of the system of water main pipes, hydrants, meters, taps, etc., laid complete, including all labor, he estimates that to be $76,958. And in answer to the third part of the question in reference to the cost of duplication, would say that at present prices of cast iron pipe, special castings, hydrants, valves and supplies and labor, the present system of pipes used in the distribution system, can be made for approximately $70,000, this however, does not include the two suction pipes from the pumps to the crib.

He was then asked to give a statement of the present value,

original cost, and cost of duplication at this time of the pumping station, including its engines, machinery, pumps and suction pipes and all parts of the pumping station as he found it when he made his several examinations; and he answered that for the original cost of that part of the system not covered in the previous sections, namely the suction mains, intakes, power station, pumps, boilers, and all the appurtenances in and about the station he estimated the power station at $5,500; pumping machinery and appurtenances, $14,400; boilers, $3,100; and two lots of land, $2,500; and he estimates the present value of the parts of the system above stated at the figures named, less three per cent., for annual depreciation. And he estimates that at the present prices of material for pipes, hydrants, valves, lead, labor, etc., and the present prices of pumping machinery, that the plant could be duplicated for approximately $114,230. He then gives the number of the valves of the different sizes and states their approximate value at $2,000. He states the number of hydrants and their value at $4,025, and the valve boxes at $322; he estimates the value of the water meters and water taps at $6,840. He describes the buildings at the pumping station and the smoke stack and values them at $5,000. He was asked to estimate the original cost of the engines, etc., and again put it at $14,400, and the present value of them at $14,000. He describes the boilers and machinery also in detail and says that he estimates the total cost of the system at $111,840, and he was asked then to state the total cost of duplicating the system at this time, considering the present value of material and labor; and he said that he estimated the cost of duplicating the system now with equal capacity of pumps, equal sizes of water

mains, equal number of hydrants, valves, etc., at approximately $114,230; that he said would be the cost of an entirely new plant, and every part of it an exact duplicate of the present system. He was then asked to give the total value of the water works system and plant including all its property of every kind and description, its real estate, houses, pumping station, machinery, pipes, engines, pumps and pipe system—everything about it; and he stated that the present value of the system, deducting for wear and tear and for repairs that would necessarily have to be made, was $76,978. And he says that he means by repairs that would necessarily have to be made that such repairs are constantly necessary to keep the machinery in effective condition. He was then asked to give the annual cost of operating the Owensboro Water Works system, giving the various items in detail, based upon his examinations, and he states it at $6,100 per annum, giving details. He estimates that the wear and tear annually on the present value of the plant would be approximately $2,500, and explains what is properly included in wear and tear. He states that the size of the pipe in this system would not, under the methods of standard construction and under the best practices in different cities and towns through the country, be regarded as ample and adequate in point of size to furnish the customary fire protection demanded and properly considered as being possible in case of one or more fires breaking out in different parts of the city at the same time.

His attention being called to the fact of there being 60,100 feet of 6-inch pipe in the system, that is, over eleven miles, he says that is a greater amount than allowable under methods of good

design ; that the system would be more efficient if it had more large pipe in it ; that the system ought to have in it properly distributed to render it adequate about 14,000 feet of 18-inch pipe, 14,000 feet of 14-inch pipe, 6,000 feet of 12-inch pipe, 8,000 feet of 10-inch pipe, 22,000 feet of 8-inch pipe, and not to exceed 40,000 to 45,000 feet of 6-inch pipe, laid in short lines, that is connecting lines, between the larger pipe for short distances so that it would not be required to furnish an undue amount of water flowing in one direction in case of fire. Says that in the event of two or three fires at one time along the line of the 6-inch pipe in the present system, the pipe would be entirely inadequate. There are no stand pipes or reservoir and no mode of filteration employed ; that there are two or three "dead ends" where water accumulates and decays, which is more or less dangerous to public health ; that under the conditions that exist at Owensboro that in remote parts of the system the mains ought to be flushed once a week.

He states that during his experience in the last thirteen or fourteen years he has had occasion to examine the rates for water in several places and to prepare such rates in several places which went into effect ; that he had examined the scale of rates in the ordinance of March 19, 1900, and that it seems to him the rates are fair and reasonable when taken together in connection with the conditions under which the water works system here is operated. He says the method of pumping or rather the character of the pumps could be increased and bettered ; that the pumps are not of the highest duty, one has a capacity of 2,000,000 gallons per day and the other approximately 4,000,000 gallons ; one is eight or nine years old and the other four or five.

On cross-examinafion (p. 198) states that he made particular examination of the pumping station, plant, machinery, etc. ; he places the value of the pumps, No. 1 at $4,500 and No. 2 at $10,000, and describes the pumps particularly, and is examined particularly as to the machinery at the pumping station—the wells, pipes, etc. He states the prices of pipe per ton and the variations in the prices ; and a tedious examination is gone into on various matters connected with his statements in chief, but the witness does not modify his original statements.

On re-direct examination (p. 215) he states more in detail the legitimate cost of operating the plant making it $6,100 or $6,200. He further stated that he with other experts employed by the city had difficulty at first in making any examination and were refused access to the station by the company ; that the city authorities had to apply to Judge Evans and get an order requiring access to be given ; that he was unable to obtain from the water works company any information or to see any books showing gross income, or net income, or which pertained to the financial part of the management ; that he was here on two or three different occasions spending several days for the purpose of making an examination of the water works plant and system at Owensboro ; that he was accompanied by Mr. Cummings, Mr. Shifley and Mr. Wiegal, and one or two members of the city council.

Mr. Sturtevant refers to and makes part of his deposition his affidavit, printed on pages 282–286 of the record wherein the property of the company is particularly described and values given for all the various parts of it. Also operating expenses per year, etc.

James P. Wiegal, (page 216) residence at Henderson, Ky., is sixty-nine years of age and by occupation an engineer and contractor; has lived in the city of Henderson since 1857; was superintendent of the Henderson Water Works about seventeen years; the city of Henderson is thirty miles from Owensboro, and has a population of about 12,000. The city has a water works plant, built in 1875 or 1876; he is familiar with the Henderson water works system, its pumping station, machinery, engines, pipe system, valves, and pumping apparatus, and during his superintendency he laid some twelve or fifteen miles of pipe and put in two pumping engines; he describes the pipe system: it has 2,200 feet of 4-inch pipe, 9,340 feet of 20-inch pipe, 15,400 feet of 12-inch pipe, 900 feet of 10-inch pipe, 600 feet of 8-inch pipe, 2,500 feet of 6-inch pipe, 28,800 feet of 4-inch pipe, and 14,400 feet of 3-inch pipe, 1,950 feet of 5-inch pipe. He was then asked to state the cost of the different quantities of the different sizes of pipe used in the Henderson system, which he does (pp. 217–219). And he also gives the cost of the pump pits, the three engines used, the gate houses, and the two stand pipes, and thirty-seven acres of land belonging to the city upon which a reservoir and an abutment to protect the river bank and ground, stating the total cost of the system at Henderson at $212,000. He states that at the request of the authorities of the City of Owensboro, he made an examination of the Owensboro water plant in connection with Messrs. Sturtevant, Cummings and Shifley, and that after such examination he made an estimate of the value of the same and fixed it at $80,000. He was then asked to state from his examination of the Owensboro water works plant and from his own experience as superintendent and

operator of the Henderson water plant during seventeen years, what he would consider the fair and legitimate expense of operating the Owensboro plant for one year; and he put it at about $5,000 to $6,000, and said it might amount to a little more. He said the average cost of operating the Henderson plant taking the two or three years just preceding his resignation, which occurred January 1, 1898, was about $6,000, but he did not include in this, annual taxes or anything for wear and tear, or any cost for additions to the plant itself, simply the operating expenses proper. He received a salary of $1,800 at Henderson. He stated in answer to a question that from his observation and experience, the Owensboro plant was faulty in its pipe system; that the pipes are too small for anything like a big fire. He said large pipe ought to be laid parallel and about two streets apart and connected by 6-inch pipe. He said the examination of the Owenboro plant by himself and the others mentioned was carefully made and that his estimate he thinks of the value of the property is a fair one. He was then asked to go into details as to the cost of laying water pipe, estimating the pipe at $30 per ton at Owensboro per lineal foot, and he stated it as follows, (pp. 257–258): 4-inch pipe, about forty-seven cents; 6-inch pipe, about sixty-five cents; 8-inch pipe, ninety-five cents; 10-inch pipe, $1.25; 12-inch pipe, $1.55; 16-inch pipe, $2.30; 18-inch pipe, $2.70; 20-inch pipe, $3.20, and 24-inch pipe, $4.20. He said that a contractor in laying down pipe at Owensboro or Henderson could make money at those prices, both cities being situated on sandy plains. He said the city of Henderson had bought a lot of pipe this fall, fall of 1900—at $26.75 per ton; that the large pipe laid several years ago cost $17 to

$18 per ton, f. o. b. Henderson, but that iron was extremely low at that time.

On cross-examination (p. 250) he said he had about seventeen years experience as superintendent of the Henderson water plant; that he superintended the works generally, laid down pipe, bought pipe, made contracts, etc.; that prior to that time had been an engineer, operating and setting up engines. He was asked the value of the pumps at Owensboro, and stated that the contractor for this Buffalo pump had told him that he got the Owensboro contract, according to his recollection, at $10,000, which was something more than five years ago. He supposes the pumps at Owensboro would cost $12,000; that the wells would cost about the same.

On re-direct examination (pp. 230–233) he modified his statement as to the cost of operating the plant if it was run day and night, and said he thought that would probably increase his estimate of the cost of operation $2,000. He said that recently the city of Henderson had put in a new pump of the capacity of 3,000,000 gallons per day, which cost $14,000 in place, and that this pump was a great deal better than either of the pumps at Owensboro; that it was constructed by Allison & Co., at Milwaukee. The pump was put in the station at Henderson in 1899. That this new Henderson pump is better than both the Owensboro pumps.

Robert A. Cummings, (p. 233) civil engineer and contractor and was educated as civil engineer at London, England, and has practiced his profession since 1883; has had experience in hydraulic work in Philadelphia, Virginia, and West Virginia; has designed water works systems. He was engaged three or

four days at request of city authorities to examine water plant here in April, 1900. Says the original cost of the entire plant was $119,981.25 when constructed, giving in detail cost of different parts, (pp. 234–236); is asked to give present value of plant and places it at $87,250. Says the foregoing property, at present prices could be duplicated, the pipe put in the ground—and the plant ready for business for approximately $124,000; says present prices for such material are seventy-five per cent. higher than prices heretofore. Says the fair and legitimate operating expenses of the Owensboro water works plant, including salary and wages of superintendent, officers, clerical force, stationery, coal, oil, waste, and all other expenses of operating plant on fair and and economical basis for one year should be $5,600. Says four per cent. is fair estimate of annual depreciation; says buildings are in need of repairs and hence depreciated in value—smoke stack very much in need of repairs. Says Owensboro water works system as constructed does not afford adequate fire protection.

On cross-examination (p. 236) says he arrived at value of pumping engines from comparison with what a first-class pumping engine should cost. Has made plans and specifications and actually constructed water works systems at Camden, N. J., Philadelphia, Pa., Bluefield, W. Va., Columbus, O., Roanoke, Va. Says Owensboro Water Company has direct system of pumping water from river. Says 6-inch pipe will not afford sufficient fire protection to any business street in Owensboro constructed as they are now; saw disastrous fire and saw plug fail during that fire. Says he arrived at his estimate of the running expenses of the plant at Owensboro, by the salaries, the wages of

the superintendent, officers, clerical force, making allowances for stationery, and individual knowledge of what coal cost, the cost of oil, etc., and added together for approximate cost. Is not familiar with the individual wages paid, but knows what they could be duplicated for. In estimating value of pipe system uses $30 per ton as a basis. Was not a contractor at time examination of water plant was made.

On re-direct examination (p. 240) says he has been actually engaged in constructing water works plants in Philadelphia, Pa. and elsewhere as already stated.

C. W. Bransford (p. 242) is forty-two years old, lives in Owensboro, and is engaged in milling business, and has been about thirteen years; says he used water of the Owensboro Water Works Co. up to about 1896, and paid about $150 per year, when rates were raised; says it would have cost him about $500 or $600 for same quantity of water if he had continued to use water company's water at new rates. Sunk a drive well, as he could not afford to pay rates charged since 1896. Says rates now charged for water is prohibitory as far as he is concerned. Says the approximate daily average of flour made by him during 1896 was 100 barrels per day. Says he has had entire supervision of his milling business since 1893.

On cross-examination (p. 243) says he has been a citizen of Owensboro all his life; thinks the water company gave as an excuse for raising rates that taxes had been increased. Paid fifteen cents per thousand gallons under old rates. Says new rates made it thirty-five cents for the first 10,000, then they had a graduating scale for increased quantities running down—the rate got less as the quantity increased, and ran down as low as ten

cents per thousand gallons. Says so far as he knows no manufacturing concern in Owensboro. with the exception of ice factory, uses water from the present water company. Has never tried to ascertain amount of water he is using now, as his pump supplies more than he can use.

Re-examined, (p. 244) and he said he could not state approximately what it now costs to supply mill with water by his well; thinks it requires no additional steam to operate pump, and has never had any repairs to make since installed. The only expense is indirect, being for a compound to prevent boilers from scaling, and the necessity of cleaning out boilers, pumps and pipe, which he supposed would amount to $150 or $200 per year.

On re-cross examination says he considers present method of supplying his plant with water a very cheap one, but would much prefer using soft water.

Mr. Bransford appears and desires to make certain corrections (p. 246–): "In my deposition yesterday, I stated that the Owensboro Water Works Co. charged me fifteen cents per thousand gallons for water and that my annual water rent was about $150. I find that instead of there being a fixed charge of fifteen cents per thousand gallons, the charge was fifteen cents for the first 400,000 gallons, twelve and one-half cents for the next 500,000 gallons, and ten cents per thousand for the balance. Those were the rates prevailing prior to April 1, 1896.

"I stated yesterday in my deposition that their present rates were thirty-five cents for the first 10,000 gallon; thirty cents for the second 10,000; twenty-five cents for the third 10,000, etc. I find the rates are as follows; thirty-five cents for the first 30,000 gallons; thirty cents for the second 30,000; twenty-five

cents for the third 30,000; twenty cents for the fourth 30,000; fifteen cents for the fifth 30,000; fourteen cents for the sixth 30,000; thirteen cents for the seventh 30,000; twelve cents for the eighth 30,000; eleven cents for the ninth 30,000; ten cents for the tenth 30,000; nine cents for the eleventh 30,000; eight cents for the twelfth 30,000; seven cents for the thirteenth 30,000; six cents for the fourteenth 30,000. This graduated scale of prices is for so much water used per month." Says he is making these statements from bills he has and will file these bills as part of deposition, and mark them A. B. C. for identification, pp. (247–250.)

Charles Broeker (p. 250) says he is forty-one years of age, resides in Owensboro, Ky., and is engaged in the milling business. Has lived in Owensboro a little over eight years. Manufactures flour, meal and feed. Mill has a capacity of 350 barrels of flour per day. Used water of Owensboro Water Co. up to November 1, 1897; since then obtained it from river by driving a pipe from mill to river and pumping water from river. Quit water company because rates got too excessive. Rate was increased in 1896, and prior to increase was paying $60 per year; under increased rates water amounted to from $15 to $19 a month. Has been engaged in milling business twenty-five years, and has management and control of his manufacturing plant in Owensboro. Says a miller such as he is cannot afford to pay rates of the water company. Was engaged in milling business at Springfield, Ill., and Greenville, Ill.

On cross-examination (p. 252) says it costs him about $5 per month to pump his own water from river. Says he has just been elected as councilman. Has not applied to water company for special manufacturers rates since he changed.

On re-examination says he was elected member of council to fill a vacancy caused by a resignation.

Re-cross examined says has been a citizen of Owensboro eight years, and that the taxes were raised by city on water company.

Charles A. Haney (p. 253) says he is fifty years old and is chief of fire department; has been chief since preceding January. Attended fire second of July that occurred in Owensboro in which buildings of Marsden Co. was destroyed. Was there from 9:30 until two or three o'clock in morning. Observed water supply and found it insufficient; would not throw water up to fire; valves were open fully. Four streams turned on, and water was insufficient from two of them; wouldn't throw water up to eaves of roof where fire was; building forty or fifty feet high. Nozzle was an inch nozzle. Had two hose attached to hydrant of one inch each.

On cross-examination (p; 255) says in his opinion failure to get sufficient stream of water was due to lack of pressure. Saw that water was turned on fully at Clay street plug; it was all turned on. Was asked if he knew of his own knowledge why the hose when carried up into the building to a window, would throw the water to the eaves, while it would not do it from the ground; and said he supposed it did not have pressure enough. Does not know about effect of water pressure on different nozzles. Was asked if too much pressure did not interfere with fire by reason of the inability of the men to handle the nozzle; said he had never seen any time yet they could not handle it. Said if there was too much pressure it could be regulated at hydrant. We asked what damage was caused by

not having pressure; answered it would hardly reach to the eaves of roof.

On re-examination (p. 262) was asked if the hose were attached to the nearest hydrants to the fire; and answered yes.

E. B. Shifley (p. 264) says he is thirty-five years old, lives in Owensboro and is city engineer and a civil engineer; has been acting as civil engineer for over fifteen years. Has had experience in planning water works systems, laying pipe and such work. Has been engaged in work as civil engineer in Bucyrus, Ohio; Bellevue, Ohio; Spokane, Wash.; Plainfield, N. J.; Sewickley, Pa., Richmond, Ind.; Cambridge City, Ind.; Milton, Ind.; Toplin, Ind.: Olympia, Wash.; Galion, Ohio; and Owensboro, Ky. Says he visited the pumping station of the Owensboro Water Works Co. with Mr. Weigal, of Henderson, Mr. Sturtevant, of Chicago, and Mr. Cummings, of Owensboro, and made an examination of the water works plant, its pumping station. boilers, engines, etc., and familiarized himself as far as possible so as to make an estimate of the original cost, and estimated the same to be $115,000; and the present value of the property to be $84,000. Was asked what property entered into his estimate. Says there were three boilers, and he estimated the present value of these to be $2,700; pump designated as No. 1, was estimated at $4,000; pump No. 2 at $6,000; buildings, $10,400; (?) two suction pipes at $4,800; the distribution system estimated $84,600. He estimates the total cost of the pumping station, including all the pumping machinery, wells, boilers, machinery and ground—everything except the distribution system—at $30,400. Was asked to give a particular statement of the amount of the pipe they have of the different sizes,

and says they have 400 feet of 20-inch pipe, suction pipe; 600 feet of 16-inch, 5,600 feet of 12-inch, 300 feet of 10-inch, 10,750 feet of 8-inch, 60,100 feet of 6-inch 28,075 feet of 4-inch, and 1,300 feet of 3-inch pipe. Says 20-inch pipe is worth laid in the trench, $932; 12-inch pipe, $5,716; 10-inch pipe, $346; says this is net cost of these and he added a per centage for incidentals—ten per cent. for incidentals. He estimates the 10,750 feet of 8-inch pipe at $6,342.50; the 60,100 feet of 6-inch pipe at $7,500; (this is a manifest mistake in the printer, it should be $27,045) the 27,075 feet of 4-inch pipe at $8,984; and the two and 3-inch pipe at $286. He made an estimate for special castings on statement made to him by Mr. Martin, superintendent of the water company. Was asked to state, as near as he could, what the plant could be duplicated for today at present prices estimating the pipe at $30 a ton, laid down and complete, in working order in Owensboro, and out of new material; and he stated: "At $30 a ton for castings, it could be duplicated for $114,230." Says $6,100 is a fair estimate of the annual expenses of operating the plant economically and well. Says depreciation will amount to three per cent. per annum; says the Owensboro Water Works Company has no reservoir or standpipe. Says it does not afford adequate fire protection because there is too large a per centage of small pipe. Says no system of filtration is used by the Owensboro Water Works Company, being pumped direct from river into mains. Says it is not fit for domestic service during high water without sedimentation.

On cross-examination (p. 268) says he has been city engineer in half a dozen cities. and has been in the profession about fifteen years; was six years at Bucyrus, Ohio. Has seen a great deal

of the pipe system of water company in excavating the streets during the past summer while improving streets in Owensboro. Was asked the amount of pipe of Owensboro Water Works Company in and around city; answered if he had made no mistake in addition, there were 106,125 feet, from three up to twenty inches. Says pumps were made by a Buffalo firm and partly rebuilt by the New Albany Pump Company. Knew value of pumps through Mr. Sturtevant, who obtained value from manufacturer. Says pipe system approximates 22.8 miles, with an average depth under ground of three feet. Has graded the streets lately and found some places where the pipe were so near the surface that they had to be laid deeper.

F. A. Ames (p. 276) resides in Owensboro and is a carriage manufacturer, and has been so engaged in the city sixteen or eighteen years. Employs 125 hands; made 5,700 carriages last year. Says the water rates charged by appellee were increased in 1896, whereby the rates instead of being $5 were put up to about $20 per month; gives particular statement and files several receipts from the Owensboro Water Works Company. He says the company affords inadequate fire protection; there has been lack of pressure and in some cases insufficient water; mentions instances. That there has been great complaint of the insufficiency of the service of the water company at fires. Says he is a housekeeper and that the water furnished is unsafe for use unless carefully filtered; that when the river is high the water is wholly unfit for domestic uses. That he was compelled to sink a well for the use of his plant; that manufacturing establishments in Owensboro cannot afford to pay the rates charged by the company. That the rates charged by the com-

pany for domestic service are extremely high, and as compared with other towns of this size, he would say were more than double.

X. In commenting on the evidence it is desired at the outset to point out the character of that offered by the appellee.

1. As to that offered relative to the value of the plant, what is it worth? Do those vague, general statements satisfy the mind of the court? The appellee had it in its power to have shown to the court the original, actual cost of this property, the cost of all improvements and extensions, They could have shown the cost of every part down to the last detail. The original cost would have thrown strong light on *its present value* —the essential and one of the most important facts to be considered in determining the reasonableness of rates. They made no effort to show what the various parts of the plant could be duplicated or reproduced for today. This fact, like the fact of original cost, if shown would not be conclusive but would throw light upon the present value of the property. They have not placed before the court these facts or any of them, but on the contrary, have studiously avoided doing so and have concealed them. The bill and the evidence avoids the essential facts *all necessarily within the knowledge of appellee*, and essential to a full and fair consideration of the case.

2. As to the annual expense of operating the plant. The evidence offered by the appellee is equally unsatisfactory. When it is considered that the company has books and records by which it could have shown to the last dollar the annual cost of operation from year to year—for ten years if necessary—the mind is irresistibly forced to the conclusion that the appellee

could not, consistently with its interest, afford for the whole truth to be disclosed, and therefore the policy of evasion, concealment and suppression was adopted. Details are avoided. Gross sums and general statements only are given. When by cross-examination it is sought to descend into details the witnesses for the most part, nearly all of them being either employes or engaged in like business, some for the same people elsewhere, give evasive answers and sometimes refuse, on advice of counsel, to answer at all.

Certainly the inference to be drawn from this course of conduct must be unfavorable to appellee.

3. It is axiomatic that those who appeal to the chancellor should do so with clean hands, should candidly and fully state all facts material to the cause, should produce all the evidence in his power that will aid the court in arriving at a just decision.

The pleadings of the appellant, the course pursued in the cross-examination of the appellee's witnesses, the examination of appellant's own witnesses, all show that the appellant city has sought to lay before the court, in the fullest manner posssible, every fact material to a just decision of the case. Appellant has endeavored to show in detail the original cost, the present value and cost of duplication of every part of the water plant at Owensboro; the real estate, the buildings, pumping station, with its well, its suction pipes, pumps, engines, boilers, pipes to the mains, the number of feet of pipe of the different sizes, the cost of laying, giving in detail every item of material, labor, and expense connected therewith; the value of the valves, hydrants, meters, boxes, taps, etc., and these valuations are made by competent persons, skilled in the business.

4. Sturtevant, an educated engineer, seventeen years steadily engaged in the construction of water works systems, constructing and superintending the construction of over twenty different plants, familiar with every detail of such work, carefully examined the plant, and he describes fully and with the greatest possible particularity every part of appellee's property and *values it as it stands in the present condition at $76,958.* He attempts to, and no doubt states approximately the original cost of it—$111,840—and then makes an estimate based upon actual knowledge and experience of the cost of duplicating the plant at $114,230.

5. Mr. Weigal, not a college graduate to be sure, but a machinist, and for about seventeen years continuously and up to January 1, 1898, superintendent and manager of the municipal water plant owned by the neighboring city of Henderson, a city only thirty miles distant, similarly situated and nearly of the same population and territory. One object of his evidence was to contrast the two water plants, prove the cost and value of the Henderson plant, and the different parts of it, and their value, the size of the pipe and mains, etc., and then prove by the witness from his personal examination and inspection, the value of the Owensboro plant and show wherein they differed. This puts before the court a mass of facts that are valuable in considering the case. For example, in the Henderson system there are 2,200 feet of 24-inch pipe, in the Owensboro system, none; in the former, 8,430 feet of 20-inch pipe, in the latter none, except 400 feet of suction pipe; in the former 17,400 feet of 12-inch pipe, in the latter 5,600 feet; in the former 900 feet of 10-inch pipe, in the latter, 300 feet; in the former 600 feet of 8-inch,

in the latter, 10,750 feet; in the former, 2,500 feet 6-inch pipe, in the latter, 60,100 feet; in the former, 28,800 feet 4-inch pipe, in the latter 28,075; in the former, 14,400 feet 3-inch pipe, in the latter 1,300 feet, etc. The cost of the 24-inch and 20-inch pipe in the Henderson system is $35,000 while there are no such pipe in the distribution system at Owensboro. There is more than three times as many feet of 12-inch pipe in the Henderson system as there is in the Owensboro; the difference in cost being about $19,000. There are in the Henderson system several parts that do not exist at Owensboro, namely, two standpipes, $20,000; thirty-five acres of land, $7,000, (Owensboro, $2,500) a reservoir, $19,000; stone abutment at river, $6,000, making a difference on these items of $50,000, and $54,000 on pipe, a total of $104,000 in favor of the Henderson system, which deducted from the total cost of the system $212,000 leaves $108,000 as the original cost approximately of the Owensboro system. But this is modified by the excess of 6-inch pipe in the Owensboro system over Henderson say of $8,000; and thus it is shown with reasonable certainty that the *cost* of the Owensboro system is approximately what Sturtevant put it at, namely, $111,840.

Mr. Weigal, after his examination of the Owensboro water works plant and making his calculation fixes the *present value of the plant at approximately $80,000.*

6. Mr. Cummings, a civil engineer of thirteen years actual experience in hydraulic work, educated for the profession in England, also made a particular examination of appellee's plant and property at Owensboro, with Sturtevant and Weigal. His figures are a little higher than the two preceding witnesses. He estimates the original cost of the plant at $119,981.25, that it

could be duplicated at present prices for labor and material for $124,500. He fixes the *present value of the plant and property at $87,250.*

7. Mr. Shifley, a civil engineer of fifteen years experience, accompanied the others, Sturtevant, Weigal and Cummings, in making the examination of the plant and property of the appellee. He estimates the original cost of the property at $115,000; that at present prices for labor and material the property could be duplicated for $114,230, and he estimates *the present value of the property at $84,320.*

(See Record, pp. 193, 220, 225 and 265.)

8. In addition to this evidence there is the evidence furnished by the appellee through its officers in reports made under the law of the state, Art. 3, Chap. 103, Ky. Stats., to the auditor for the years 1892 to 1878 inclusive. The reports are summarized in the following table;

Year ending September 15th.	Capital Stock, $100 Share.	Bonded Debt.	Other Debt.	Value of Tangible Property.	Gross Earnings.	Salaries and Wages.	Interest.	Dividend.	Enlarg't Plant.	Other Expenses.	Total Expenses.	Deficit.
1892	$355.000	$215.000	$21.139 07	$60.000	$22.565 77	.....	.....	.....	.....	.....	.....	.....
1893	355.000	215.000	21.031 39	75.000	26.328 50	.....	.....	.....	.....	.....	.....	.....
1894	355.000	219.000	26.058 53	75.000	27.776 14	.....	.....	.....	.....	.....	.....	.....
1895	355.000	241.000	5.448 94	75.000	29.124 80	.....	.....	.....	.....	.....	.....	.....
1896	355.000	239.000	5.890 55	75.000	28 267 49	$4.878 20	$14.859 87	.....	$2.493 00	$9.628 99	$31.860 06	$3.592 57
1897	355.000	238.000	.....	75.000	22.621 20	4.208 20	14.280 00	.....	125 72	10.275 08	28.889 00	6.267 80
1898	355.000	237.000	20.000 00	76.500	26.598 99	6.210 20	11.900 00	.....	.....	12.321 10	30.431 30	3.832 31

9. In the reports under the head of kind of tangible property, pipe system, pumping station, tools, hydrants, lot on which the pumping station is located, vacant lot corner McFarland and Triplett streets and about three acres of ground in Daviess county. Fair cash value of tangible property at the price it would bring at a fair valuation sale, $75,000. It was valued at that sum for the years 1893 to 1897; for the year 1892 at $60,000; and for the year 1898 at $76,500.

These reports were made for the purpose of enabling the "Board of Valuation and Assessment," at Frankfort, consisting of the auditor, treasurer and secretary of state to fix the value of the franchise of the appellee. The value of the tangible property under the law is deducted by this board and is assessed by the local assessors. There was, therefore, no motive for undervaluing the tangible property in these reports.

Several of the appellee's witnesses in their general lump statements put the value of this property at from $220,000 to $250,000. These statements cannot, we think, be satisfactory to the court. The valuation of the property made by persons entirely impartial, of skill and experience, without interest in the controversy, or motives to induce other than true statements, must be more satisfactory and reliable; and those persons fix the fair value of the appellee's plant and property at $77,000, $80,000, $84,000 and $87,250; that is, from seventy-seven to eighty-seven thousand dollars. The allegations of the appellant's answer that the fair value of the property was not greater or more than $90,000 is therefore sustained.

10. The next matter to be considered is that of the operating expenses. Mr. McGonigale, gives, over the protest of com-

plainant's counsel, on cross-examination items and amounts of such expense which he says are shown by the books of the company. He says the wages, salaries, etc., for the year ending June 30, 1900, were $4,130.72; taxes, $2,536.60; coal, $892.95 (for the preceding year $899.40). He does not distinctly say the taxes were all for the year in which paid. These items aggregate for the year $7,658.67. That the gross income for the year was $31,577.43. The wear and tear is placed by him at about three or four per cent.

It is probably a fair summary of his evidence to say that the annual gross income of the company is approximately $30,000, of which $7,400 is from the city for hydrant rentals, leaving $22,600 as the amount received from private consumers.

And Asa Williams, probably the fairest and best informed witness introduced by appellee, says (p. 146, q. 134) that he personally knows that the officers of the company made a calculation to ascertain the effect of the ordinance complained of, and found that the reduction would be about one-third from the rates charged by the company. Assuming that their calculation was approximately correct there is to be deducted from the gross income (less hydrant rentals) of $22,600, one-third or $7,500, thus leaving $15,100 as the net sum to be realized under the ordinance according to their estimate. From this deduct the items of operating expenses, including coal, $5,000, taxes, $2,500, wear and tear or repairs, $2,500, making $10,000, we have left $5,100. To this add $7,400 for hydrant rentals and we have a net income of $12,500, *or more than twelve per cent. on the fair value of the property employed in the public service; or, five or six per cent. on the exaggerated values given by some*

of the appellee's own witnesses. This is approximately the result on the appellee's own showing. The only material evidence on the question of the value of the property offered by the appellee is that of McGonigale and Williams, both employes of the company, and though there is perceptible some partiality, the facts they disclose strongly support the contention of the appellant.

It will be observed that the gross income given by the auditor, McGonigale, from the books of the company is considerably greater than that stated in the reports made to the state auditor for the purpose of enabling the state board to ascertain and assess the value of the franchise of the company.

The reports to the state auditor show that the expense of operations for the years 1896, 1897 and 1898 amounted to $15,296.60, or an average of $5,100 per annum.

The evidence of the witnesses for the city, Sturtevant, Weigal and others, show very satisfactorily that the ordinance rates are fair and reasonable. The contention of the city is that the rates by the ordinance would not reduce the income from consumers more than twenty-five per cent., and certainly not more than thirty per cent. That the increased consumption consequent upon lower prices would very soon result in a gross income as great or greater than the company now has from the exhorbitant rates under which it is now operating.

A reduction of rates does not necessarily, except perhaps for a very short period, result in any reduction of gross income. The contrary must be the immediate result, because as the commodity is cheapened, especially if the commodity be, as water is, a necessity, its consumption is increased, and consequently the income therefrom is also enlarged. Though it is doubtless

true that the expense of conducting the business, in this case the expense of operating the plant, is also increased, but such increase in expense is comparatively small. For example, if the water company has 1,200 "taps" or private consumers, and its income from these and other sources is $25,000, and its expense of operation $6,000, if the number of private consumers should be increased fifty per cent., or to 1,800, the increased expense of operation caused thereby would not probably exceed ten or twelve per cent, on the previous cost of operation, or say $600 or $800 per annum. The "house connections," so called, are always paid for by the property owners. If such an increase made an extension of the pipe system necessary, the cost thereof would be properly chargeable, not to the expense of operation but to the enlargement of the plant and consequently an enhancement of its value.

The evidence of Ames, Broeker and Bransford show that the rates charged by the water company for water are so excessive that the manufacturing establishments in the city cannot afford to use it; that they are prohibitory and that the water furnished for domestic use is not filtered or settled; that it is pumped directly from the river into the pipes and mains and delivered to consumers in the same condition as when taken from the river; that it is utterly unfit for domestic consumption when the water in the river is muddy, as all know it is three, four or five months of each year.

11. Little need be said as to the amount of the annual taxes. It appears that they range from $2,200 to $2,500 per annum.

12. The item of wear and tear or repairs is not as great as is contended by the appellee. The witnesses for the company put

it about four or five per cent. This estimate is probably approximately correct for the machinery. It amounts to little or nothing—probably not one per cent.—on the pipe system. On the *machinery* probably three to five per cent. and the pumping station with all the machinery connected with it cannot, it is believed, be fairly valued at more than $25,000 or $30,000. At all events, taking into consideration all the evidence, the fair conclusion is believed to be that $2,000 to $2,500 is an abundantly sufficient allowance for this item.

13. We take no account of the so-called bonds, amounting to $237,000, of the Owensboro Water Works Company, for two reasons, (1) they were issued as consideration for the attempted transfer of the Owensboro Water Company to the appellee of its franchises, and property, which transaction was utterly void. And, being void, it was and is incapable of ratification. And for the same reason, no estoppel can arise out of it. If either ratification or estoppel were allowed in such a case, then parties by indirect action would be enabled to do the very thing which the law prohibits from being done directly. See, 10 Wallace 684 and Jacksonville, &c., Railway v. Hooper, 160 U. S. 524. (2) There is no evidence in the record which even tends to show that any money ever realized from those bonds or any of them was ever paid into the corporation, or that the bonds were assets of the corporation. The bonds are not based upon any valid consideration, were issued in an illegal and prohibited transaction.

And as to the stock, which amounts to the enormous sum of $355,000, there is no evidence that it represents any money. To the extent only that it represents property or money actually and

legitimately expended for property which went into the corporation, it is not entitled to be considered.

The rates prescribed by the ordinance complained of, will yield income sufficient to defray legitimate operating expenses, wear and tear and taxes, and pay approximately twelve per cent. on the fair value of the property employed in the public service, and about five per cent. even on the extravagant valuation placed on it by the appellee.

14. It is contended by the appellee that under the ordinance the company is prohibited from collecting compensation for water furnished consumers in advance. The contention is based on section 3 of the ordinance which is as follows :

> "Sec. 3. That water rates may be collected by said persons, firms, companies and corporations from all consumers falling within the provisions of sections one and two of this ordinance who have water meters attached, monthly, quarterly or semi-annually, at the election of said persons, firms, companies or corporations furnishing the water, but water rates shall not be collected in advance except by voluntary consent of the consumer. * * *"

It is obvious that this section cannot be so construed. It relates entirely to collections for water service where a meter is attached. It has no reference to collections that may be made from consumers where a meter is not attached. Perhaps not one customer in twenty has a meter. Moreover, while the rates must be ascertained from a reading of the meter prescribed by a rule of the company, and rates collected accordingly, nothing

therein prevents the company from requiring security for the payment of the rates, either of money or by bond with good surety of course the company is at liberty to make any reasonable rule it chooses to adopt that does not conflict with the ordinance. There is certainly no just ground for appellee's contention on this point.

15. The purpose of section 6 was to require the company to keep accounts of its income and expenditures and report the same to the city authorities, so that they might be in possession hereafter of all such facts as were proper or necessary to be considered in adopting a schedule of reasonable rates for water service, just alike to the company and to the public. The city authorities had been unable to procure any statement from the company of its income or expenditures.

16. The courts will presume that the local authorities acted in good faith, that they were reasonably intelligent persons and knew they had no authority to prescribe rates that were unreasonable. For such rates would inevitably result in a tedious, expensive litigation and ultimate defeat, and thus, instead, of securing relief from onerous and unjust exactions, only loss and injury would result to the city and the community. To permit passion or prejudice or any other motive to influence them to fix inadequate rates would be unwise and unjust. Plain common sense, average intelligence and integrity would all dictate to the city authorities that they must, *at their peril*, be just and fair; that neither the state or federal courts would permit the enforcement of rates that were unjust, that if illegal rates were prescribed their work would be undone and no relief given to the community. There was therefore no motive for the city author-

ities to fix unjust rates, assuming that they were men of average intelligence. The charge is wholly unwarranted and unsupported by any fact appearing in this record. The question of motive is, immaterial. The question is whether the rates are just or not. If the rates are just they must stand though every man concerned in adopting them was actuated by a bad motive. If they are unjust, they must fall, though every councilman was moved by the purest and most patriotic purposes. Cooley on Torts, 2d Ed. p. 832; Soon Hing v. Crowley, 113 U. S. 710; Minnesota v. Barber, 136 U. S. 320; New Orleans v. Warner, 175 U. S. 145.

In Soon Hing v. Crowley, Justice Field in delivering the opinion of the court, said:

> "The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China residents therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police, or other legitimate purposes. There is nothing, however, in the language of the ordinance, or in the record of the enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or infer-

able from their operation, considered with reference to the condition of the country and the existing legislation. The motives of the legislators, considered as the purpose they had in view, will always be presumed to be to accomplish that which follows as the natnral and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse characters of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned ; and of this there is no pretense."

The courts have said over and over that the judicial tribunals will indulge the presumption that the legislature or the tribunals to whom the power has been confided by the legislature to prescribe rates have not transcended their authority.

The burden therefore rests on the complainant to show to the court in the most satisfactory way possible under the circumstances, that its rights have been distinctly invaded. The doubts are to be resolved against the company. It cannot evade or avoid this duty to the court by coming with loose general allegations, carefully avoiding the vital facts, and when the answer traverses the bill and sets out those facts essential to a full investigation by the general reply, shift the burden upon the defendant to establish facts exclusively, or almost exclus-

ively, in the possession of the company. For example who knows except the appellee, the original cost of the entire property; its pumping station, its pump, its engines, boilers, its pipes, mains, meters, valves, etc., etc., down to the smallest piece? Who knows, except the appellee, its exact income and the sources of it from year to year? Who knows, except the company, the cost from year to year of operating the plant, its coal bills, salaries, wages, taxes, repairs, etc.? Certainly no one. And yet, this company, refusing to disclose these vitally important facts, is asking the court to prevent the enforcement of rates prescribed by the local authorities. No other inference can be drawn from such conduct than that full disclosures would be destructive of the company's case.

Chief Justice Waite in delivering the opinion of the court in Spring Valley Water Works Co. v. Schottler, 110 U. S. 353-4, said:

> "It is said, however, that appointing municipal officers to fix prices between the seller and the buyers is in effect appointing the buyers themselves, since the buyers elect the officers, and that this is a violation of the principle that no man shall be a judge in his own case. But the officers here selected are the governing board of the municipality, and they are to act in their official capacity as such a board when performing the duty which has been imposed upon them. Their general duty is, within the limit of their powers, to administer the local government, and in so doing to provide that all shall so conduct themselves, and so use their own property as not unnecessarily to injure others. They are elected by the people for that purpose; and whatever

is within the just scope of the purpose may properly be entrusted to them at the discretion of the legislature. That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn v. Illinois, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

And reference is here made to the language of Justice Harlan in San Diego Land Co. v. National City, 174 U. S. 754, already quoted on pp. 37-42 of this brief. And Judge Ross in the same case on the circuit (in 74 Fed. 83) says: "Undoubtedly every intendment is in favor of the rates as established by the municipal authorities."

"The court is bound to assume," said Judge Woolson, in Capital City Gas Light Co. v. Des Moines, 72 Fed. 840, "until the contrary is proven, that the council of the defendant city have acted with due regard to the rights of the plaintiff, and have established reasonable rates."

It has also been announced that if the rates adopted are of doubtful reasonableness or validity the matter should be left to the test of actual experiment.

In the case of Tilley v. Savannah, Florida & Western Railroad Company, 5 Fed. Rep. 662, Judge Woods said:

"The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running expenses of the road

and the interest on its bonded debt, leaving nothing for dividends to its stockholders. The railroad commissioners assert that their schedule was framed to produce 8 per cent. income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way, and it seems to me it is the only one, by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the railroad commission—in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation."

And Judge Brewer in the case of the Chicago, Burlington & Quincy Railroad Company v. Dey and the other Railroad Commissioners, 38 Fed. Rep. 656–664, says on the latter page:

"Where the effect of the rates is doubtful, with a probability that they will prove compensatory, and the amount of business to be affected thereby is comparatively small, I think the courts may well wait for the test of experience. Influenced by these considerations, I am led to refuse the preliminary injunction, and to set aside the restraining order heretofore entered. It may well be that by the time this case comes to final hearing the test of experience will have solved some of these matters, and it may be clear—as now seems probable—that the rates imposed by this last schedule are compensatory within the rule laid down in the prior opinion, in which case no injunction ought to issue, or clear

that they are not compensatory, in which case, beyond any doubt in my mind, a final and permanent injunction ought to be granted. The preliminary injunction will be refused, and the restraining order will be set aside."

And in Pensacola & A. R. Co. v. Florida, 25 Fla. 310, 3 Lawyer's Repts. Ann. 661, 671, Chief Justice Raney uses this language:

"Where a tariff has been fixed by a commission it must be tested by experiment, unless it is shown or appears upon its face to be destructive of the railroad's interests. Neither the courts nor the railroad company can substitute its judgment for that of the commission where there is room for difference of intelligent opinion. A different rule from this would install a presumption that the commission neither knew their duty nor desired to do it. Like all officers, they will be presumed to know and do their duty until the contrary is shown."

If the rates prescribed by the ordinance complained of were of doubtful validity this course would have been peculiarly appropriate in present case. Certainly no great damage could have resulted in any event to the appellee. And the account of income and expenses of operation under the rates prescribed by the ordinance would have shown conclusively whether the contention of the appellee or of the city was correct, and would necessarily have furnished a basis for fixing just rates in the future.

We submit that by the best, the most valuable and satisfactory evidence, in the case, it appears conclusively that the present value of the appellee's property does not exceed about $90,000. That the total original cost of it from 1878 to the present time was not probably more than $115,000. That it could now be duplicated with entirely new material for approximately $115,000 to $120,000. That the water furnished is unfiltered and for more than one-third of the year unfit for domestic use; that the rates are excessively high, and for manufacturing establishments so exhorbitant as to be prohibitory; that the system is constructed on a cheap and insufficient plan; that because of no standpipes, no reservoirs, and the absence of large pipe in the system, the excess of small pipe, especially six-inch pipe, the fire protection is altogether insufficient. That the rates prescribed by the ordinance are shown beyond reasonable doubt to be just and fair to the company and to the public.

We contend that it is plain on the evidence, that the stock to the amount of more than $200,000 does not represent either money or property paid into or received by the corporation, and that the corporation received nothing from the bonds; that we see enough here, though much has been suppressed or withheld by appellee, to induce a belief that the organization of the appellee company has been as bad and as much open to judicial censure as that of the Cincinnati, Columbus & Hocking Valley Railway Co., 36 Fed. 54, 146, U. S. 630, 645. That the company has manifestly been for years and is now engaged in exacting from the public excessive and oppressive rates for the inadequate service rendered, to pay interest and principal on these unlawfully issued bonds.

We earnestly insist that this "excessive capitalization," represented by this enormous amount of stock and bonds, shall be excluded from all consideration in fixing rates and in the decision of the question of whether the rates prescribed by the ordinance are just; that instead, only the fair value of the property employed in the service shall be taken into account, considering the nature and value of the service rendered.

17. The ordinance of March 21, 1900, has two distinct objects in view; the regulation of rates to be paid for water delivered to private consumers; and the enforcement of a course of conduct on the part of the water company for the protection of the public health, by flushing the mains, etc. There is also a provision that the company shall keep an account of its income and expenses and make a report thereof to the common council. (See sections 5, 6, 8 of the ordinance, Record, pp. 34, 35.)

The provisions for flushing the mains at certain stated times is based upon sub-section 16 of section 3290, Ky. Stats., Charter of cities of the third class, which is as follows:

> "16. To make all police regulations to secure and protect the general health, comfort, convenience, morals and safety of the public; and to define, declare, prevent, suppress and remove nuisances either within the city or within one mile thereof."

When it is remembered that there is no standpipe, no reservoir and no filtration of the water delivered by the appellee to consumers by any mode, that the water is pumped directly from the Ohio river into the pipes and mains of the company and de-

livered in that condition, that mud and filth settles in the arms leading from the mains to the hydrants at the street intersections throughout the city the necessity for this provision is perfectly obvious.

The pipes leading from the mains to the hydrants at the street corners fill with mud and debris which decays and renders impure the water in the mains, making it unwholesome and unfit for domestic use, necessarily producing sickness, and no doubt, in many instances causing deaths.

Surely this provision is but a reasonable and proper police regulation. The court below, however, enjoined the enforcement of this provision along with every other part of the ordinance. So that now, no matter how muddy the water may be, or how filthy it may be, the city is enjoined from requiring the company to flush the mains and relieve them of the accumulations of mud and filth.

This court has in numerous cases upheld and enforced in the most vigorous terms the exercise of the police powers of the state and municipalities for the protection of the public health as well as the public morals and safety. It has declared that the legislative branch of the government cannot contract away its duties to protect the public health, morals and saftey: Stone v. Mississippi, 101 U. S. 819; Butchers Union v. Crescent City Co., 111 U. S. 750; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Barbier v. Connelly, 113 U. S. 31; Beer Co. v. Massachusetts, 97 U. S. 33; Fertilizing Co. v. Hyde Park, 97 U. S. 667; Railroad Co. v. Bristol, 151 U. S. 567; Chicago R. R. Co. v. Nebraska, 170, U. S. 58. See also, on the scope and extent of police powers, Commonwealth v. Alger, 7

Cush. 53; Thorpe v. Rutland R. R. Co., 27 Vermont 140; Cooley Const. Lim. 710, and Dillon Mun. Corp., secs. 141, 142.

The provision requiring accounts to be kept of the income of the company and the expenses of operation, etc., and reports to be made semi-annually thereof to the common council of the city, was intended to place before the city authorities such facts as would enable the common council to fix just and fair rates for water. Why should the city be enjoined from requiring the company to furnish this information to the common council? If the business of the company was strictly private, if the general public had no interest in it, it could with propriety be said, of course, that the city authorities had no right to require such disclosures. But that is not the case here. The business of supplying water to the inhabitants of the city by the company is one which affects every man, woman and child in the community. It is a business of vital interest to the public. The company is a *quasi* public corporation; it is a practical monopoly. The property of the company is "affected with a public interest;" and the company and its property is not *juris privati* only.

The company had refused on former occasions to furnish information of this character, information which was deemed valuable if not absolutely essential to prescribing just rates for water, and it was doubtless the purpose of the council while enacting the ordinance fixing the rates therein, to modify them, from year to year, either raising them or lowering them, as the information to be furnished might render just and proper.

The legislature of Kentucky, has in many instances, required such accounts and reports from turnpike companies for the purpose of obtaining information to enable it to fix rates, and the

common council was pursuing a policy adopted more than fifty years ago by the state in similar matters.

18. We have endeavored to show that the passage of the ordinance of March 20, 1900, was authorized by the laws of the state; that the rates fixed by the ordinance were, under the constitution and laws, just and reasonable, under the existing conditions. Not only that they were just rates, but, we submit that we have shown that they were liberal, enabling the company to pay all legitimate operating expenses and from ten to fourteen per cent. on the value of the property employed by the company in the public service. And this too when the water was unfiltered and for practically half of each year unfit for domestic use.

We further contend that if the court should differ from us as to the rates, still, the decree is erroneous in that it enjoins the city from enforcing the sanitary provisions of the ordinance and for that reason, if for no other, the decree of the circuit court should be reversed.

19. We respectfully submit the following summary of our conclusions:

1. The bill is insufficient; the allegations of it are vague and general many important facts essential to a correct decision of the case and necessarily within the knowledge of the complainant are omitted.

2. The evidence introduced by the appellee is general and of little value, consisting largely of opinions based not upon knowledge but upon information. While the evidence of the appellant goes into particulars, giving in full detail the kinds and quality of the property—an inventory of it—and stating the present value of the different parts, and the present value of

property as a whole. Estimates are also made of the original cost of the plant and property and the cost of the duplication at this time; also estimates of the cost of operation and amount of annual taxes and all expenses connected therewith.

3. The evidence introduced by the appellant shows that the prices fixed by the ordinance are, under all circumstances of this care, just and reasonable.

4. It conclusively appears from the evidence that the excessive capitalization is enormous; that a fair value of the property does not exceed $90,000.00; that the total cost of the plant did not exceed $125,000.00; while the stock of the company is $355,000.00, and its bonded indebtedness is $237,000.00.

5. That the service rendered by the company is bad and of little value; that the water is not filtered or otherwise clarified and purified; that it is for a great part of every year unfit for domestic use; that owing to the smallness of the pipes in the distribution system the supply of water is insufficient and does not for that reason afford adequate fire protection; that the prices charged by the company are exorbitant for both domestic and manufacturing purposes.

6. That the alleged assignment or sale or transfer of the franchises, contracts or property of the Owensboro Water Company to the appellee, the Owensboro Water Works Company, was without authority of law, contrary to public policy, ultra vires and void.

7. That under the various provisions of sec. 3290 Ky. Stats. especially sub-sections 5 and 16, there was ample authority conferred upon the common council to enact the ordinance of March 21, 1900. That by sub-section 5 the power is conferred to regu-

late the water service and to fix and regulate the price of the service. The water service is antecedent of the word "thereof;" that the mode in which the city might provide the service is not the substantive or primary thing, but the service is; the second sentence empowers the city to fix the price of the service; that it is obvious that if power is given to a municipal or *quasi* public corporation to render public service and nothing is said as to the prices that may be charged there is, nevertheless, by implication, power to charge a reasonable price for the service. In Stone v. Farmers Loan & Trust Co., 116 U. S. 329, it is said by Chief Justice Waite, in delivering the opinion of the court:

> "We return to the special provisions of the charter on which this case depends, and find, first, the authority given the corporation to carry persons and property. *This of itself, implies authority to charge a reasonable sum for the carriage.*"

That the second sentence of sub-section 5 cannot, therefore, reasonably be supposed to have reference to works which the city might erect for supplying water; that it would be anamolous to contend that the city might contract for supplying water which would necessarily involve consideration, that is, prices, and yet have by implication or otherwise power to modify such contract without the consent of other party.

(In the appendix will be found sections 3290, 3426 and 3438 Kentucky Statutes marked C.)

8. The decree of the circuit court is, it is respectfully sub-

mitted, erroneous, first, in enjoining the enforcement of the ordinance fixing the price of water; second, in enjoining the city from enforcing the sanitary provisions of the ordinance enacted for the protection of the public health.

Wherefore, the appellant respectfully prays the court to reverse the decree of the circuit court and direct the dismissal of the bill.

GEORGE W. JOLLY,

Attorney for Appellant

APPENDIX A.

GENERAL STATUTES, CHAPTER 56.

(Acts 1869-70, p. 94.)

Section 1. Any number of persons may associate themselves together and become incorporated for the transaction of any lawful business, except banking and insurance, and for the construction of railroads; but such incorporation shall confer no powers or privileges not possessed by natural persons, except as hereinafter provided.

Sec. 2. Among the powers of such bodies-corporate shall be the following:

1. To have perpetual succession.

2. To sue and be sued by the corporate name.

3. To have a common seal and alter the same at pleasure.

4. To render the shares or interests of stockholders transferable, and to prescribe the mode of making such transfers.

5. To exempt the private property of members from liability for corporate debts.

6. To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy.

7. To establish by-laws, and make all rules and regulations deemed expedient for tne management of their affairs, not inconsistent with the constitution or laws of this state or of the United States.

Sec. 3. Before commencing any business, except that of their own organization, they must adopt articles of incorporation, which shall be signed and acknowledged by them as deeds are required to be acknowledged, and recorded in a book kept for that purpose in the office of the clerk of the county court of the county where the principal place of business is to be.

Sec. 4. Corporations for the construction of any work of internal improvement shall, in addition, file a certified copy of such articles in the office of the secretary of state, and have the same recorded by him in a book kept for that purpose. Such articles of incorporation must specify the highest amount of indebtedness or liability, direct or contingent, to which the corporation is at any time to be subject, which must in no case exceed two-thirds of its capital stock.

Sec. 5. A notice shall be published for at least four weeks in some newspaper as convenient as practicable to the principal place of business; said notice shall specify:

1. The names of the corporators, the name of the corporation, and its principal place of transacting business.

2. The general nature of the business proposed to be transacted.

3. The amount of capital stock authorized, and the times when, and the conditions upon which it is to be paid in.

4. The time of the commencement and termination of the corporation.

5. By what officers or persons the affairs of the corporation are to be conducted, and the times at which they are to be elected.

6. The highest amount of indebtedness or liability to which the corporation is at any time to subject itself.

7. Whether private property is to be exempt from the corporate debts.

Sec. 6. The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk, and their acts shall be valid if the publication in a newspaper is made, and the copy filed in the office of the secretary of state, when such filing is necessary, within three months from such filing in the clerk's office. No change in any of the foregoing particulars shall be valid, unless recorded and published as the original articles are required to be; nor shall any change be made at any time or in any manner, which would be inconsistent with the provisions of this act.

Sec. 7. Corporations for the construction of any work of internal improvement may be formed to endure for fifty years; those formed for other purposes shall not exceed twenty-five years in duration; but in either case they may be renewed from time to time for periods not greater than was at first permissible, if three-fourths of the votes cast at any regular election held for that purpose shall be in favor of such renewal. The articles of incorporation shall provide a mode by which a member may, at any time, withdraw from such incorporation, and also the mode of determining the amount to be received by such member upon withdrawal, and for the payment thereof, subject only to the rights of creditors of the corporation.

Sec. 8. The corporation shall not be dissolved prior to the period fixed upon in the articles of incorporation, except by a majority of the stock of its members, unless a different rule is adopted in the articles; and no such premature dissolution shall take place unless preceded by the newspaper publication required at its organization.

Sec. 9. Intentional fraud in failing or refusing to comply substantially with the articles of incorporation, shall be a misdemeanor, and, upon indictment and conviction in a court of competent jurisdiction, the party or parties so offending shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or imprisonment for not less than three months nor more than one year, or fine and imprisonment or both, at the discretion of the jury; and any person who has sustained injury from such fraud may also recover damages therefor against those guilty thereof.

Sec. 10. The intentional keeping of false books or accounts by any corporation, whereby any one is injured, shall be a misdemeanor on the part of those concerned therein, and they shall upon trial and conviction be fined in any sum not less than one hundred nor more than one thousand dollars.

Sec. 11. Transfers of stock shall not be valid, except as between the parties thereto, until the same is regularly entered upon the books of the company, so as to show the name of the person by whom and to whom the transfer is made, the numbers or other designation of the shares, and the date of the transfer. The books of the company shall be so kept as to show, intelligibly, the original stockholders, their respective interests, the amount which has been paid thereon, and all transfers thereof; and such books, or correct copies thereof, so far as they relate to the items mentioned in this section, shall be subject at all times to the inspection of any stockholder desiring the same.

Sec. 12. Any corporation organized, or attempted to be organized, in accordance with the provisions of this act, shall cease

to exist by a non-user of its franchise for five years at any one time; but such body shall not forfeit its franchises by reason of any omission to elect officers, or to hold meetings at any time prescribed by the by-laws.

Sec. 13. Corporations whose charters expire by their own limitation, or by the voluntary act of the stockholders, may, nevertheless, continue to act, for the purpose of closing up their business, but for no other purpose.

Sec. 14. Nothing herein shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them, for the purpose of defrauding creditors; and an execution against the company may, to that extent, be levied upon the private property of such individual.

Sec. 15. For the purpose of making repairs, rebuilding or enlarging or extending works; or to meet contingencies or for the purpose of providing a sinking fund for the payment of debts, the corporation may establish a fund, and loan the same out, from time to time, taking, in all cases, good and sufficient security for the repayment of same.

Sec. 16. In any proceedings by or against a corporation, the court shall have the power to compel the officers of the corporation, on the motion of either party, upon proper cause being shown, to produce the books of the corporation, and when so produced, either party may use the same in evidence.

Sec. 17. Persons acting as a corporation under the provisions of this act, shall be presumed to be legally organized until the contrary is shown; and no such franchise shall be declared actually null or forfeited, except in a regular proceeding brought for that purpose.

Sec. 18. No person acting as a corporation under the provisions of this act, shall be permitted to set up or rely upon the want of legal organization, as a defense to action brought against them as a compromise; nor shall any person who may be sued on a contract made with such corporation, or sued for an injury done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his defense.

Sec. 19. For taking and certifying the acknowledgement of the articles of corporation, the clerk of the county court shall receive a fee of one dollar, and for recording the same he shall receive a fee of ten cents for each one hundred words, and the secretary of state shall receive a like fee for recording the same in his office.

Sec. 20. No company organized under the provisions of this act for the purpose of doing a mining or manufacturing business, shall have power to construct or operate any railroad, tramway, turnpike or canal, except such as may lead from its principal works or place of business to some navigable stream, or to some existing railroad, turnpike, or other public highway.

APPENDIX B.

GENERAL RESERVATION LAW.

(Acts 1855, page 15.)

Sec. 8. All charters and grants of or to corporations or amendments thereof, enacted or granted since the fourteenth of February, 1856, and all other statutes, shall be subject to

amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed no amendment or repeal shall impair other rights previously vested.

APPENDIX C.

(Kentucky Stats. Secs. 3290, 3426 and 3438.)

Sec. 3290. The common council of each of said cities shall, within the limitations of the constitution of the state and this act, have power by ordinance:

1. To levy and collect taxes upon all property, franchises and privileges taxable for state purposes.

2. To appropriate money and provide for the payment of the debts and expenses of the city.

3. To prevent the introduction of contagious diseases into the city, to make quarantine laws for the purpose, and enforce the same within ten miles of the city.

4. To establish and erect hospitals, alms-houses, city prisons, work-houses, make regulations for the government thereof, and to acquire and hold land for the purpose, either within or beyond the boundaries of the city.

5. To provide the city and the inhabitants thereof with water, light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the prices to private consumers and customers.

6. To provide for the prevention and extinguishment of fires and to organize, establish and maintain fire companies.

7. To open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean, sprinkle and keep in repair streets, alleys, lanes, avenues and sidewalks, or to have the same done; and to erect, establish, and keep in repair bridges, culverts, sewers, gutters and to provide for the erection of all buildings for the use of the city; and to make appropriations for same.

8. The common council may construct or reconstruct, maintain, alter, repair or change a system of sewers in such manner and at such time as the common council shall, by ordinance, declare, either by general taxation or at the cost of the property owners. The common council, may, by ordinance, construct, build, maintain, repair, alter or change a system of sewers at the cost of the property owners of said city; but if so constructed, the same shall be done as follows: The common council shall divide said city into districts of not less than three nor more than nine, and as nearly equal in area and population as possible; and not less than one district be sewered at one time. The cost of sewering an entire district shall be apportioned among the property owners of said district ratably, according to the superficial area of said property owners' holdings in said sewer district. The engineer of the said city shall make the estimate and apportionment of cost to each lot owner, and submit the same to the common council; and when said apportionment shall be received by said council, the amount found due by said engineer's report from each lot owner shall become a lien on the property of said property owner in said sewer dis-

trict, and shall became due and payable at once, and if not so paid, may be collected by petition in equity, filed in the circuit court of the county by the contractor performing said work for the city; and said court in equity is hereby empowered to enforce said lien and sell said property to satisfy said amount due for constructing sewerage; but the cost of sewering all intersections of streets shall be paid for by the city.

9. To license, tax and regulate the sale of spirituous, vinous and malt liquors in the city or within one mile thereof.

10. To license, tax and regulate hackney carriages, cars, omnibuses, wagons, drays and all other vehicles, and to fix the rate to be charged for the carriage of persons and property within the city, and to the public works and property of the city beyond the city limits.

11. To license, tax and regulate theatrical and other exhibitions, shows and amusements, either within the city or within one mile of the city limits, or to prohibit and suppress the same.

12. Each city shall raise a revenue from ad-valorem taxes and a poll tax and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year by ordinance for the assessment of all real and personal estate within the corporate limits thereof, subject to taxation for state purposes, and shall levy an ad-valorem tax on same, not exceeding the rate and limit prescribed in the constitution; and for school purposes, not exceeding fifty cents on each one hundred dollars of taxable property therein, or such portion of the poll tax or license fees as the council may designate; to levy a poll tax not exceeding one dollar and fifty cents on each adult male inhabitant thereof; and may impose license

fees on stock used for breeding purposes, on franchises, trades, occupations and professions, and provide for the collection thereof. All taxes and license fees shall be levied or imposed by ordinance, and the purpose or purposes for which the same are levied or imposed shall be specified therein, and the revenue therefrom shall be expended for no other purpose than that for which it is collected.

13. To prohibit and suppress all gambling houses, disorderly houses and bawdy houses, and the selling, displaying or exhibiting obscene pictures and literature.

14. To regulate, restrain or prevent the establishment or continuance in or near said city of any trade or occupation, business or manufactory offensive to the public or dangerous to health, or in causing or producing fire; and to regulate the sale of fire arms, and to prevent the carrying of concealed deadly weapons.

15. To regulate the storage of gunpowder, tar, pitch, rosin, saltpetre, gun-cotton, coal oil, lime and other combustible, explosive or inflamable material, and the use of lights, candles, lamps, furnaces, stoves, steam-pipes and other heating and lighting appliances in all sorts of buildings and places, and to regulate or suppress the use and sale of fire-crackers, fire-works and toy pistols.

16. To make all police regulations to secure and protect the general health, comfort, convenience, morals and safety of the public; and to define, declare, prevent, suppress and remove nuisances, either within the city or within one mile thereof.

17. To establish standard weights and measures to be used in the city.

18. To provide for the inspection and measuring of lumber and other building materials.

19. To provide for the inspection and weighing or measuring of stone, coal, wood and fuel, hay, corn and other grain and produce of all kinds.

20. To provide for and regulate the inspection of beef, pork, flour, meal and other provisions, oil, whiskey and other spirits.

21. To provide for and regulate the inspection of milk, butter, lard and other provisions; to regulate the vending of meat, poultry, fish, eggs, vegetables and fruits; to restrain and prevent the forestalling and regrating of provisions, and to establish and regulate markets and market-houses and places.

22. To impose fines, forfeitures and penalties, and terms of imprisonment for the violation of ordinances and by-laws, and to provide for their recovery and appropriation, and to provide for the seizure and destruction of all instruments of gaming.

23. To provide for the arrest, imprisonment and punishment of all rioters and disorderly persons by day or by night; and for the prevention, suppression and punishment of all riots and breaches of the peace, noise, disturbance or disorderly or unlawful assemblies, either within the city or within one mile of its limits.

24. To regulate or prohibit and prevent the erection of wooden buildings in such parts of said city as may be deemed proper, and to provide for the removal of the same at the cost of the owners, when erected or continued contrary to ordinance.

25. To regulate the construction of all buildings in the city, to prohibit and prevent the construction of unsafe buildings, or buildings without adequate means of escape in case of fire, and

to provide for the inspection of buildings and the construction of fire-escapes.

26. To impose penalties upon the owner, occupant or agent of any house, wall, sidewalk or other structure which may be considered dangerous or detrimental to the public, unless after due notice, to be fixed by ordinance, same to be removed or repaired; and to remove or repair same at owner's expense when suffered to remain contrary to ordinance.

27. To establish, license, tax and regulate all ferries across any river within the limits of said city, or bounding thereon, and to fix ferry rates.

28. To regulate, tax, license or suppress the keeping and going at large of all animals within the city, to impound the same, and in default of redemption pursuant to ordinance, to sell or kill same.

29. To provide for inclosing, improving and regulating all public grounds belonging to the city, in or out of the corporate limits.

30. To improve and preserve the navigation of any navigable river within or adjoining said city.

31. To erect, repair and regulate public wharves, docks and landings, and to fix the rate of wharfage.

32. To regulate the stationary anchorage and mooring of vessels or rafts.

33. To acquire, establish and maintain public cemeteries, parks, squares, avenues, promenades and fountains, either within or without the city; to make all necessary appropriations for the cost and maintenance of the same, and to make regulations for the government thereof.

34. To provide for the closing on election days all places where spirituous, vinous or malt liquors are sold.

35. To grant the right of way along, over or across the streets, alleys and public grounds of the city to any railway, street railway, gas, water, steam heating, telephone or electric light or power company for a term not exceeding twenty years. Before granting such franchise or privilege, such city shall first, after advertising same for a period of not less than thirty days, in some newspaper published in said city, receive bids therefor publicly, and award same to the highest and best bidder, having the right to reject any and all bids. Said city shall reserve the right to require such companies to conform to any change or altered grades of said streets and public grounds, to pay the cost of paving or otherwise improving between its rails and for reasonable distance on either side thereof, to make culverts beneath same for the free flow of water, and shall not be liable for any damage for delay in the operation of the business of any such company occasioned by any street improvement or repairs, or the constructing, bursting or repairing of any sewer or pipe in or across any street, alley or public ground, or injury by any mob or other violence; and shall reserve the right at any and all times to require a change of rails, or mode of construction or operation, to suit public convenience, and to require any pipes raised or lowered, and any wires taken down and laid underground, as the public good may require, and shall not be liable for the cost or damage occasioned by such changes, and shall reserve the right and power to regulate and control same and the streets, alleys and public way wherein they may be laid or constructed, as the public good may require. All such grants

shall expire and become void, notwithstanding a consideration, shall have been paid therefor, unless a *bona fide* organization shall have taken place and business been commenced and prosecuted thereunder in good faith, within one year from the date thereof. The council may impose other conditions and terms in addition to and not inconsistent with those enumerated herein. The provisions in this subsection as to advertisements and bids, and limiting the grant to twenty years shall not apply to the grant of the right of way to a trunk railway.

36. To establish a board of health, and to invest it with such powers and impose upon it such duties as may be deemed necessary.

37. To establish a board of sinking fund commissioners, and to invest it with such powers, and impose upon it such duties as may be deemed necessary. The board of sinking fund commissioners shall consist of the mayor and two other persons, not city officers, who shall have the same qualifications as councilmen, to be appointed by the mayor and confirmed by the common council, who shall hold their office for four years without compensation. Said commissioners shall make an annual report of their doings and transactions to the common council, and execute bond, to be approved by council, for the faithful discharge of their duties.

38. To provide for the appointment of a police force, and to fix annually, in the month of December, the number of same, and their salaries, which shall be uniform, except the chief of police may be paid more. In case the common council shall fail in the month of December of any year to fix the number and salaries of the police force, they shall remain for the ensuing year as previously fixed.

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39. To ascertain by survey, and mark and establish the boundaries and limits of said city, and all enlargements and additions thereof, and of the streets, alleys, lots and blocks thereon, and to make a map of same.

40. To carry out the full intent and meaning of this act and to accomplish the object of this incorporation.

Board of Public Works.

Sec. 3426. The common council of cities of the third class may, by ordinance, establish a board of public works, to consist of three freehold electors of said city, and who have been *bona fide* residents of the city so establishing said board of public works for two years next before their appointment. Said ordinance shall require the mayor of said city to appoint said board of public works in one month from the passage of the ordinance creating said board, and no two of said members of the board of public works shall be selected from the same ward. When no board of public works has been established, the duties herein imposed shall be performed by the common council, and such other employes and agents as said common council may elect or designate.

Sec. 3438. The board of public works shall have the exclusive power and control over the construction, supervision, cleaning, sprinkling, repairing, grading, and improving all streets, alleys, avenues, lanes, public cemeteries, parks, squares, fountains, wharves and landings, market-houses and places, bridges, sewers, drains, ditches, culverts, streams, canals and water-

courses, side-walks, curbing, and the lighting of all such public places may be deemed necessary within the corporation; to fix and establish grades of all streets, alleys, avenues and thoroughfares; they also have the power, supervision and control over the construction, repairing, cleaning, lighting and heating of all public buildings, and over all public improvements of the city. They shall have the exclusive power to make all improvements and expenditures, within the revenue limits allowed by the council which shall cost less than five hundred dollars, but shall let all contracts over fifty dollars to the lowest responsible bidder after due advertisement. The said board shall have the exclusive power to organize and control the fire department, the work-house, the hospital, the alms-house, the city prison, and such works as the city may own for supplying the city or the inhabitants thereof with water, light, heat or power.

Sec. 3256. This act shall be a public act, and be judicially noticed and liberally construed by the courts; and all previous charters of the cities embraced herein, and all amendments thereto are hereby repealed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 58

City of Owensboro, ... Appellant

v.

Owensboro Water Works Co., . . Appellee

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

REPLY TO PRINTED ARGUMENTS FOR DEFENDANT

MAY IT PLEASE THE COURT:

In reply to arguments in the briefs filed for the defendants it is desired to submit further discussion of the power of the city to regulate the management of the water company and to fix the prices to be paid for water by private consumers.

An act was passed by the legislature of Kentucky, which was approved March 6, 1876, entitled "An Act to reduce into one all the acts relating to the City of Owensboro." Acts 1876,

Vol. 1, pp. 551, 593, Ch. 390. Section 4 of Article 4 of this Act confers upon the common council of the city "full power to make, publish, amend, and repeal all ordinances for the following purposes, to-wit : * * * * * * *

> "Twenty-first. To make, establish, and regulate public wells, cisterns, reservoirs, and pumps, and to provide for the furnishing the city, and the inhabitants thereof, with water and gas." (p. 557.)

Afterwards, another act was passed, which was approved March 18, 1882, entitled "An Act creating a new charter for the City of Owensboro." Acts 1881, Vol. 1, pp. 817, 856, Ch. 461.

By section 10 it was provided that the common council "shall have full power to make, publish, amend, and repeal all ordinances for the following purposes to-wit : * * *

> "Twentieth. To make, establish, and regulate public wells, cisterns, reservoirs, and pumps, and to provide for the furnishing of the said city and the inhabitants thereof with water and gas." (p. 822.)

After the adoption of the present constitution of the state in 1891, which required the municipalities of the state to be classified for the purpose of organization and government and their organization and powers defined and provided for by general laws, the cities of Frankfort, Bowling Green, Paducah, Henderson and Owensboro, were placed in the third class by an act approved September 30, 1892, and an act approved June 14, 1893,

was passed for the government of cities of the third class, which contains the provisions quoted in appellant's brief on pp. 11, 12 and in appendix C, which is simply a continuation of the power to provide water and light service to the city and people of the city, given first by the act of 1876 and continued by the act of March 18, 1882, *supra*.

The power to furnish the city and the inhabitants of the city with water and gas was expressly granted to the city in 1876, and has been continued, in substantially the same terms, to the present time. By the act of June 14, 1893, (sub-sec. 5 of sec. 3290) power was given to provide the city and the inhabitants thereof with power, heat and telephone service, in addition to the *previously* given power to provide *water* and *light* service. And, for the first time, the further power was given by the last sentence of sub-section 5, to make regulations for the management of the water and other services mentioned, and to fix and regulate the price of the service to private consumers and customers of that service.

The act of 1882, supra, repeals, only "*inconsistent*" laws and "all acts and parts of acts in *conflict* with this act," (secs. 112, 120).

The rule is that in the repeal of an existing statute and a re-enactment of it at the same time, the re-enactment neutralizes the repeal, Sutherland on Stat. Const., secs. 133, 134. The old law is continued in operation.

By sec. 166 of the present constitution it was provided that all acts for the government of towns and cities should remain in force no longer than four years from January 1, 1891, and that the legislature should within that time provide by general laws for the government, of the cities and towns of the state.

By these several acts the power given by the act of 1876, to furnish the city and inhabitants with water, has been continued in force, without interruption, to the present time.

And therefore the legislature in inserting the last sentence in sub-sec. 5 could not have intended, and should not, we submit, be construed as having intended, that the power to regulate the water service and fix prices for the service, should only apply to provisions for that service to be made thereafter, but, giving fair force to the language used, in view of the power to provide the service to the city and people of the city which then existed and had existed more than twenty years, must be presumed to have intended the power to be exercised with reference to the water service then existing, as well as any future service.

It must be presumed that the legislature of the state of Kentucky in preparing and passing the act for the government of third class cities, was fully informed as to the conditions existing in each and all of them and intended to give them all such powers as were suitable for their government according to the conditions existing in each, and, that some of these cities provided water for their inhabitants by works owned and operated by the municipalities, and others were having the water supplied by water companies owned by private persons. It was wholly unnecessary to empower a city which was then operating its water plant, the city of Henderson for example, to make regulations for the management of its plant or to fix and regulate prices of water furnished to the inhabitants of that city, because, having already power to maintain and operate its plant and furnishing water to the people there, it would, by necessary implication, have the power and right to regulate the prices for the service. This sentence could, therefore, have no application

to the city of Henderson but would have force at Owensboro. And the power, so far as it related to providing water service, contained in the *first* sentence of sub-sec. 5, being one that had existed in the charters of the City of Owensboro for many years prior to the passage of the act of 1893, and by this act continued in force, it seems but reasonable to presume that the *second* sentence was intended to apply to Owensboro, and the other third class cities, that might be having water service supplied by water companies owned and operated by corporations organized for that purpose.

THE SECOND SENTENCE IN THE SUB-SECTION CONFERS UPON THE COMMON COUNCIL NEW, SEPARATE AND COMPLETE POWERS, NEVER BEFORE GRANTED, TO REGULATE THE MANAGEMENT OF WATER SERVICE, AND TO FIX PRICES FOR THAT SERVICE.

By the general principles of the common law, persons or corporations who have a monopoly, by law or by force of circumstances, and are engaged in business or have embarked their property in a business, affected with a public interest, are compelled to serve all who apply, at reasonable rates, and are not permitted to charge excessive prices for the service rendered. And it is further true, that although maximum rates for such service may have been prescribed by the legislature or by some board, tribunal or other body appointed by the legislature, they are not binding or conclusive upon the persons for whom the service is rendered. That is, if the rates charged for the service, though they do not exceed the maximum rates fixed by the legislature or other tribunal, or by contract between the municipality and the persons rendering the service, are unjust, the person for whom the service is rendered may lawfully refuse to pay them. If such rates have been exacted, the person from whom exacted

may recover back the excess above what is just, And if there is a threat to discontinue the service, or a refusal to perform it, at reasonable or just prices, the person aggrieved may have relief by injunction. Bolt v. Stennett, 8 T. R. 608 ; Allnut v. Inglis, 12 East 538 ; Lough v. Outerbridge, 144 N. Y. 271, 42 Am. St. Reps. 717 ; Chicago R. R. Co., v. Jones, 149 Ill, 361, 41 Am. St. Reps. 282 ; Griffin v. Goldsboro Water Co., 122 North Carolina 207, 41 L. R. A. 240 ; Cook v. Chicago Railroad Co., 81 Iowa 551, 25 Am. St. Reps. 512 ; Brundred v. Rice, 49 Ohio St. 640, 34 Am. St. Reps. 589.

On the other hand it is equally true that no legislature, or legislative board or tribunal has lawful authority to fix maximum rates that are unjust to the person or corporation performing the public service.

While this common law right exists in favor of the person for whom the public service is rendered, its vindication must always be expensive and few citizens can afford to enter into litigation except as they have large or very valuable interests at stake.

These considerations doubtless induced the legislature to insert in sub-sec. 5, power to regulate the management of the water service and fix maximum prices for the service.

The power was lodged in the common council and it in prescribing maximum rates, acts as an arbitrator between the company on the one hand and the people on the other. It must be just to the company and likewise just to the consumers of water. It should not attempt to invade the constitutional rights of the water company, nor should it permit the company to charge the public unjust rates or prices for the service rendered.

Considering the common law and statutory law in force in

the state, and in view of the express language of the charter, that its provisions shall receive a liberal construction, we submit that power to enact the ordinance of March 21, 1900, existed in the common council, and that the only question is whether the rates prescribed are just. That question has been fully discussed in the original brief.

Respectfully submitted,

GEORGE W. JOLLY,

Attorney for Appellant.

NO. 18546.

Supreme Court of the United States

OCTOBER TERM, 1903, NO. 58.

CITY OF OWENSBORO, ... Appellant.

vs.

OWENSBORO WATER WORKS COMPANY, OF OWENSBORO, KENTUCKY, ... Appellee.

BRIEF FOR APPELLEE.

May it please Your Honors:

Appellee, Owensboro Water Works Company, of Owensboro, Kentucky, through W. W. Davies and Robert W. Bingham, of counsel, calls attention to the following statement of the case now before Your Honors:

STATEMENT.

The bill of complaint of appellee, in this case, is based upon the following propositions: Appellee, the Owensboro Water Works Company, is a corporation, located within the corporate limits of the city of Owensboro, Kentucky. Its business is to furnish appellant, the City of Owensboro, for compensation, water for public purposes, and to furnish private consumers, for compensation, water for domestic purposes. Appellee has a contract with the City of Owensboro to furnish it water for public purposes. On the 19th day of March, 1900, appellant, City of Owensboro, passed and adopted an ordinance, approved by the mayor March 21, 1900, which impaired

and violated the rights of the company, acquired under its charter and under the laws of Kentucky and under the Constitution of the United States. It is alleged in the bill of complaint that the rates fixed by the ordinance of March 19, 1900, to be charged by the company for the water which it furnishes to private consumers, are so unreasonably low, ruinous and inadequate as to practically destroy the value of the company's property and to devote it to the use of the public rather than to the just use of the owner. In this way it violates the constitutional rights of the company, first, in taking its property for public use without just and fair compensation; second, in depriving it of its property without due process of law; third, in denying it the equal protection of the laws. The bill charges that the city has no authority to fix or regulate the company's water rates. The bill alleges that the Legislature of Kentucky has not, nor has any general law, at any time, conferred on the city of Owensboro (a city of the third class) any power or authority to fix or regulate water rates to be charged by the company to private consumers, or to make such regulations as the ordinance attempts to impose. It is alleged by the bill that such regulations are ruinous and oppressive. The bill charges that the ordinance of the city attempts to impose upon the company a number of unconstitutional and unjust regulations. The issues were made between the company and the city on these propositions in the court below. The circuit court held that the city had no power to fix the rates at which the company should furnish water to residents of the city of Owensboro, or to make certain oppressive regulations with respect to the company, and that the ordinance was void. An injunction and decree issued enjoining the city from enforcing its ordinance or from interfering, in any way, with the established and existing rates charged by the company. Thereupon an appeal was taken by the city to the

Circuit Court of Appeals, Sixth Circuit. Counsel for the company moved the dismissal of said appeal upon the ground that where the jurisdiction of the circuit court is based solely on the ground, clearly disclosed by the pleadings, that a law of a State is claimed to be in contravention of the Constitution of the United States, the parties being citizens of the same State, the Supreme Court has exclusive jurisdiction of an appeal in such case, and the appeal would not lie to the Circuit Court of Appeals, although other questions may also have been involved and may have determined the decision. The Circuit Court of Appeals sustained said motion of counsel for the company to dismiss the appeal, and the appeal was dismissed, as shown in the reported case of City of Owensboro v. Owensboro Water Works Company, 115 Federal Reporter, 318. In making said appeal to the Circuit Court of Appeals, counsel for the city appealed upon all questions of law and of fact in the case. After the dismissal of said appeal, counsel for the city brought this appeal to the Supreme Court.

POINTS.

I.

A MUNICIPAL ORDINANCE, PASSED UNDER SUPPOSED LEGISLATIVE AUTHORITY, IS REGARDED AS A LAW OF THE STATE WITHIN THE MEANING OF THE CONSTITUTIONAL PROHIBITION AGAINST STATE LAWS IMPAIRING THE OBLIGATIONS OF CONTRACTS AND OTHERWISE VIOLATING RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

II.

THE CITY OF OWENSBORO HAD NO POWER TO PASS THE ORDINANCE COMPLAINED OF, BECAUSE NEITHER THE CONSTITUTION NOR THE LAW OF KENTUCKY GIVES TO THE CITY OF OWENSBORO, A CITY OF THE THIRD CLASS, ANY POWER TO PASS OR ENFORCE AN ORDINANCE FIXING WATER RATES OF A PRIVATE COMPANY TO BE CHARGED TO PRIVATE CONSUMERS, AND SECTIONS 3290 AND 3438 OF THE STATUTES OF KENTUCKY, CONFERRING CERTAIN POWERS UPON CITIES OF THE THIRD CLASS, NEITHER DELEGATE TO SUCH CITIES POWER TO MAKE REGULATIONS FOR THE MANAGEMENT OF PRIVATE WATER COMPANIES, NOR POWER TO FIX OR REGULATE THE PRICES OF THEIR SUPPLY OF WATER TO PRIATE CONSUMERS. THE POWER TO REGULATE THE COMPANY OR FIX ITS PRIVATE RATES, IF NOT GRANTED TO THE CITY BY EXPRESS STATUTE OF THE STATE, IS NOT WITHIN THE GENERAL OR POLICE POWERS OF THE CITY.

III.

THE ORDINANCE, IF AUTHORIZED AT ALL BY ANY LAW OF THE STATE, SHOULD FIX RATES, TO BE CHARGED BY THE COMPANY TO PRIVATE CONSUMERS, WHICH ARE REASONABLE AND JUST, AND WHICH, IF PUT INTO EFFECT, WOULD ENABLE THE COMPANY TO EARN A FAIR PROFIT ON ITS INVESTMENT, AND WOULD NOT DEPRIVE THE COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST

COMPENSATION, AND WOULD NOT DEPRIVE THE COMPANY OF THE EQUAL PROTECTION OF THE LAWS.

IV.

THE EVIDENCE, IN ITS CHARACTER AND WEIGHT, SHOWS CONCLUSIVELY THAT THE ORDINANCE OF MARCH, 1900, IF ENFORCED, WOULD COMPEL THE COMPANY TO OPERATE AT A RUINOUS LOSS, AND, UNDER THE SCHEDULE OF RATES FIXED BY THE ORDINANCE, THE COMPANY WOULD BE UNABLE TO EARN ANY PROFIT ON ITS INVESTMENT. THIS IS SHOWN BY A COMPUTATION MADE EXCLUSIVELY FROM CONTENTIONS OF COUNSEL FOR THE CITY AND EVIDENCE FOR THE CITY.

V.

THE ORDINANCE ATTEMPTS TO MAKE CERTAIN RATES UNCOLLECTIBLE IN ADVANCE, BUT COLLECTIBLE ONLY AFTER THE WATER SERVICES TO CONSUMERS HAVE BEEN RENDERED. SUCH ATTEMPT BY THE ORDINANCE IS CONTRARY TO THE CONTRACT OF THE CITY WITH THE COMPANY, AND IT WOULD RESULT IN GREAT LOSS TO THE COMPANY. THE SET OF RULES FOR THE REGULATION OF THE COLLECTION OF RENTS BY THE COMPANY, PROMULGATED BY THE ORDINANCE, IS CONTRARY TO SUCH CONTRACT AND RUINOUS TO THE COMPANY.

VI.

THE UNJUST AND INIQUITOUS PROVISIONS OF THE ORDINANCE COMPLAINED OF (R., 31) ARE: (1) THAT THE COMPANY IS COMPELLED TO FURNISH WATER TO ALL MILLS, SALOONS, DISTILLERIES, BREWERIES, HOTELS, STREET RAILWAY COMPANIES AND OTHER LARGE PLANTS AT A RUINOUS RATE, FIXED BY THE SCALE OF DAILY QUANTITY USED, COMPUTED BY THE MONTH AND FIXED BY METER, WITH A PROVISION IN THE ORDINANCE THAT NO CONSUMER SHALL PAY OVER $24.00 A YEAR FOR WATER FURNISHED TO A CERTAIN AMOUNT; (2) THAT THE ORDINANCE COMPELS RUINOUS RATES FOR DOMESTIC SUPPLIES OF WATER WHERE THERE IS NO METER USED OR COMPELLED; (3) THAT RUINOUS RATES FOR SUPPLY OF WATER TO BANKS, STORES, OFFICES AND OTHER PLACES OF BUSINESS ARE COMPELLED, WITH POWER IN THE CONSUMER TO COMPEL THE PUTTING IN OF A METER ON REQUEST; (4) THAT THE COMPANY IS NOT ALLOWED TO PUT IN METERS, TO PREVENT WASTE, WITHOUT THE CONSENT OF THE CONSUMER OR THE MAYOR OF THE CITY; (5) THAT THE COMPANY IS NOT ALLOWED TO COLLECT ITS WATER RENTS IN ADVANCE WHERE THERE IS NEED OF ADVANCE COLLECTION, AND IS COMPELLED TO EXTEND HAZARDOUS CREDITS TO ALL CLASSES OF INHABITANTS; (6) THAT THE PRIVATE BOOKS AND ACCOUNTS OF THE COMPANY SHALL BE SUBJECT TO THE INQUISITION OF THE COMMON COUNCIL OF THE CITY, AND THAT A REPORT OF

THE PRIVATE AFFAIRS OF THE COMPANY SHALL BE MADE TO SUCH COUNCIL; (7) THAT THE COMPANY SHALL BE COMPELLED, AT THE WHIM OF CONSUMERS, TO LAY PIPES ANYWHERE IN THE CITY, UNDER ALL CIRCUMSTANCES, WITHOUT GUARANTEE OR SECURITY OF ANY KIND; (8) THAT THE COMPANY SHALL BE SUBJECT TO FINES AND PENALTIES IMPOSED AND ENFORCED BY THE CITY FOR THE VIOLATION OF THE PROVISIONS OF THE ORDINANCE.

ARGUMENT.

I.

The act of the city, in passing, adopting and standing ready to enforce the ordinance complained of, was a legislative act, and was under *supposed legislative authority* from the State. The *supposed* authority from the State was in sections 3290 and 3438, Kentucky Statutes, and in the general and police powers *supposed* to be accorded to cities of the third class. Proceeding under these *supposed* powers, accorded to the city by the State in statutes and general law, the ordinance was a legislative act, and its enforcement meant violations of constitutional rights. This principle has been thoroughly recognized and established.

Hamilton Gaslight, etc., Co. v. Hamilton, 146 U. S., 262-7.
Walla Walla v. Walla Walla W. Co., 172 U. S., 9, 10, 11.
Iron Mountain R. Co. v. Memphis, 96 Fed., 126.
Capital City Gas Co. v. Des Moines, 72 Fed., 818.
Owensboro W. Works Co. v. Owensboro, 115 Fed., 318.

In these cases, and in many others, it is unfailingly held that a *supposed power from the State,* such as counsel claims to appear in sections 3290 and 3438, Kentucky Statutes, and in the general law of the State, is all that is necessary to bring the consideration of the ordinance within the jurisdiction of the Federal Court. The city proceeded under its *supposed legislative* and *general-law powers,* coming to it from the State, and its ordinance falls within the scope of the National Constitution.

II.

We contend that the statutes do not confer upon the city any power to make rules or regulations for the company or to regulate the rates of the company. Their terms and meaning are contrary to any such interpretation. The able opinion of His Honor, Judge Walter Evans, in the circuit court, on page 55 of the record, is full of the clearest logic in the interpretation of section 3290. The statute is a part of the act for chartering and regulating cities of the third class in Kentucky. The act divides the various cities and towns of Kentucky, by name, into six classes, and Owensboro is designated as a city of the third class. We are, however, only interested, in this case, in the interpretation of the portions of the act as appear in sections 3290 and 3438 of the Kentucky Statutes. These sections deal with the question of waterworks and of water rates in cities of the third class. Therefore, it is under these sections that the council of the city of Owensboro passed, and attempts to enforce, the ordinance complained of. For our purposes section 3290, reads as follows:

> "The common council of said cities shall, within the limitations of the Constitution of the State, and this act, have power by ordinance . . . 5th, to provide the city and the inhabitants thereof with

> water, light, power, heat and telephone service, *by contract, or by works of its own,* located either within or beyond the boundaries of the city. To make regulations for the management *thereof,* and to fix and regulate the prices to private consumers and customers." (Our own italics.)

Neither the Court of Appeals of Kentucky, nor any other State court, has passed specifically upon the question raised in the case at bar, under section 3290, and the decision of His Honor, Judge Evans, is the only judicial interpretation yet given of the statute in relation to the question of the power of the city to fix the price of water furnished by a private company to customers and consumers. Judge Evans, on pages 55 and 56 of the record, in his opinion, says:

> "That the city is authorized to furnish water to *itself* and to its inhabitants by *contract* or by means of *works of its own* is apparent. What is the significance of the remaining words, namely, '*to make regulations for the management thereof,*' etc.? That the right to make regulations for the management *thereof* must have the words '*works of its own*' as its antecedent, seems to admit of no reasonable doubt. Those words could hardly refer to the word '*contract*' as their antecedent, because a contract must be an agreement between two or more persons, and it would seem certain that those words must refer to the phrase '*works of its own,*' inasmuch as it would not be possible, reasonably speaking, to allow the city alone to regulate a contract without the consent of the other party to it. And so in regard to the words '*fix and regulate the price thereof to private consumers and customers.*' They must be referred to the same antecedent, because the city alone could not, in the case of a contract, do anything of that kind. Anything of that sort must, in case of contract, be done by stipulation between the parties, and not by the action of any

> one of them. It would be much too loose a construction to hold that the last clause of subsection 5 reaches out after something not even alluded to in the section, to-wit, the right to fix prices charged by a private corporation which was the creature of the Legislature. All that was intended is that if the city had *works of its own*, and thereby supplied water to itself and its inhabitants, then, and in that event, it could fix and regulate the price to be charged private consumers as distinguished from itself." (Our own italics.)

We can not put the matter more plainly than the decision puts it. The statute can not allow a city council to fix the prices of water rates, because, as the able judge holds, a private company, furnishing water by *"contract,"* can not have its prices regulated arbitrarily, from time to time, by ordinance, because such would be repugnant to the most primary ideas of the force and effect of a *contract*. The last sentence of the portion of the act quoted, viz., *"to make regulations for the management thereof, and fix and regulate the prices to private consumers and customers,"* must refer to *"works of its own,"* because it can not refer to private works furnishing water upon private contracts to private consumers. If there is a contract, there must be considerations, and those considerations must be so arranged that they are not in the arbitrary control, for the purpose of alteration, of one of the contracting parties. It is possible that the statute may mean that the city council, by ordinance, has power to fix and regulate the price of water to private consumers by a *prearranged contract* with some company which proposes to build works in future and furnish the city with water upon the basis of the rates fixed by the ordinance and the prearranged contract, but the statute can not mean that the city council shall have power, by ordinance, to fix and regulate the prices charged by a company already established and furnishing water at the

time of the passage of said municipal corporations act, and before the passage of the ordinance. A reasonable and logical construction of section 3290 must, then, be, that the city council has power to fix and regulate the prices to be charged to private consumers by a company owned by the city or proposing to get a franchise to build works, and to contract for and to accept the rates fixed by the city, and to operate in the future upon the basis of prearranged and contractual rates.

In this connection we call attention to the case of Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10. This case was decided in November, 1900, by the Circuit Court of Appeals for the Eighth Circuit. In the case there was involved the construction of a Colorado statute (page 9 of the decision), reading as follows:

> "They (city council) shall have power to purchase or erect waterworks or electric light works, or to authorize the erection of the same by others, but no such works shall be erected or authorized until a majority of the voters of the city or town who are taxpayers under the law, voting on the question at a general or special election, by vote approve the same."

The court was deciding whether or not this Colorado statute applied to works *owned or erected by the city* or to works *owned by other parties.* This is the identical question involved in the case at bar. The Circuit Court of Appeals said, on pages 9 and 10 of the decision:

> *"In the second place, the statute has no application to electric light plants erected by private parties for their own business purposes. It applies only to waterworks, gas works and electric light works purchased or erected by cities, or built by cities, under contracts with them, by other parties. It was not—it could not have been—the intention of the Legislature to require the approv-*

> ***ing vote of the majority of the taxpayers of a city every time its council issued a license to a corporation, partnership or person to erect or install a gas plant or an electric light plant upon its premises for domestic or business uses."***

The finding of the court was in strict accord with our contention as to the construction which should be put upon section 3290, Kentucky Statutes. The Kentucky statute, which enables a city of the third class (Owensboro) to provide the inhabitants with water *"by contract or by works of its own,"* and to make regulations for the management *"thereof,"* and to fix prices to be charged private consumers, is clearly, under the Pikes Peak case, to be held to mean that the city can regulate only works acquired by *contract* or *owned* by the municipality, and can only fix the rates of such works.

On September 10, 1878, the city of Owensboro passed and put into full force and effect an ordinance (R., 25-29) granting certain contractual rights, privileges and franchises to the *Owensboro Water Company*, which was a specific and clear contract between the city and said *Water Company*. In 1889, the city passed and adopted an ordinance making the *Owensboro Water Works Company* the complete successor to the old *Owensboro Water Company* in all the rights, powers, privileges, contracts and franchises inuring to said *Owensboro Water Company* under its contract-ordinance (R., 30). It is plain, then, that, by the ordinance of the city (R., 30), the *Owensboro Water Works Company* succeeded to and began the enjoyment of everything embraced in the original contract-ordinance passed in favor of the *Owensboro Water Company*. (R., 25; R., 30.)

So, then, the Owensboro Water Works Company was incorporated, had obtained its ordinance from the city, was under contract with the city, and was furnishing the inhabitants with water in 1889, before the passage of the

act of 1893, of which sections 3290 and 3438 are a part. At the time section 3290 was conceived and enacted by the Legislature, the company was incorporated and in full operation in the city of Owensboro, and it was then charging and collecting its customary rates for water furnished to private consumers. Under these facts it would be impossible, from a legal or logical standpoint, for section 3290 to confer the power on the city council to fix the prices of water furnished to consumers by a private company. The wording, history, circumstances and logic of the section are against such a meaning as this.

Construed under the following well-established rules, section 3290 can convey no power to the city to fix the rates of a private company.

A thing which is within the letter of a law is not within the law unless it is also within the meaning of the law, and the words of a statute, if sufficiently flexible, must be construed in the sense which is most in harmony with that meaning.

Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10.
A. & E. Enc. of Law (1st Ed.), 23, 305 (notes).

It would not be within the meaning of the law that there should be a contract so different from all other contracts that it could be changed, abrogated, warped, distorted or made of no practical effect by the arbitrary act of one of the parties. Therefore, we say that the words of the statute are sufficiently flexible to be made to utter that which is within the meaning and spirit of the law.

Courts, in construing or interpreting a statute, give much weight to the interpretation put upon it at the time of its enactment, and since such time, by those whose duty it has been to construe, execute and apply.

A. & E. Enc. of Law (1st Ed.), 23, 339 (note).

The fact that for ten years the city of Owensboro and its officials had been construing and understanding section 3290 to mean that for which we contend, and the further fact that all the other cities of the third class in Kentucky have so understood the meaning of the statute that no case has arisen hitherto requiring any court to construe this statute, are of importance under the above rule.

The presumption is, that the Legislature does not intend to change or modify the law beyond what it explicitly declares, either in express terms or by unmistakable implications, for it is not to be supposed that the Legislature will overturn an established principle of law without expressing such intention with irresistible clearness.

A. & E. Enc. of Law (1st Ed.), 23, 357 (note).
Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10.

It is perfectly clear that before the passage of the act of which section 3290 is a part, the law was just the reverse of that contended for by the city, and there was no such thing thought of in Kentucky as a city arbitrarily fixing and unfixing the prices of water to consumers. Even if the city attempts to enforce its ordinance, under section 3290, the power to enforce would, of necessity, have to be expressed in irresistibly clear and pointed language, which is, as we see, by no means the case.

In order to arrive at the true legislative intent, in construing doubtful statutes, that construction should be adopted which is most conformable to reason and justice, and the Legislature will not be presumed to have intended that which is against reason.

A. & E. Enc. of Law (1st Ed.), 23, 358 (note).
Samuels v. Commonwealth, 10 Bush (Ky.), 491.
Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10.

Certainly the construction of section 3290 is in favor of our contention, as it is in harmony with the understanding of all the cities of the third class for the last ten years. It is in harmony with the common-law rights of the company, and it is in harmony with the doctrines of law regarding the term "contract" as used in the statute.

A statute is not to be construed to interfere with or injure rights of persons without compensation, unless there is no escape from such construction.

Endlich Int. Sts., sec. 25.
State v. Cin. Gas., etc., Co., 18 Ohio St., 301.

The common law will be held to be no further abrogated than is expressly declared, or the clear import of the language used absolutely requires. The law rather presumes that the Legislature did not intend to make any change other than what is specified and plainly pronounced. And even the liberal construction of remedial statutes may be modified by this rule.

A. & E. Enc. of Law (1st Ed.), 23, 388.
A. & E. Enc. of Law (1st Ed.), 23, 387.
Smith v. Moffat, 1 Barb. (N. Y.), 65.
Webb v. Mullin, 78 Ala., 111.

The common law will be held to be no further abrogated than is expressly declared, because, without constitutional or statutory change, the common law applies, and such principles of it apply to-day to the relations between the city and the company as have not been, by the clear language of Constitution or statute, abrogated. It must be remembered that section 3290 is a part of the general municipal-corporations act of the State of Kentucky. This general act makes and constitutes the general charters of the various cities and towns throughout the State. The cities and towns of Kentucky are unlike the cities and towns of many other States, in that their charters have

their existence in this one grand act. This act divides the cities and towns into classes, and makes various provisions for the different classes. In brief, *the act is the charter of the City of Owensboro,* and there is no other charter beyond this act. The city derives its powers from the act, and its powers are curtailed and circumscribed by the act. The city lives and breathes and moves, is checked, controlled, regulated, provided for and carried on under the provisions of this act.

It is a policy of the law to require of municipal corporations a strict observance of their powers. Any doubt or ambiguity arising out of the terms used by the legislature in making a grant of power must be resolved in favor of the public. A power can not be exercised where it is not clearly comprehended within the words of the chartering or empowering act, or derived therefrom by necessary implication.

Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10.
Thomas v. Richmond, 12 Wall. (U. S.), 349.
Com. Nat'l Bank v. Iola, 2 Dill. (U. S.), 352.
Ottawa v. Carey, 108 U. S., 110.
Daviess County v. Dickinson, 117 U. S., 657.
Savannah v. Kelly, 108 U. S., 184.
Lewis v. Shreveport, 3 Woods (U. S.), 205.
Kelly v. Milan, 127 U. S., 139.
Norton v. Dyersburg, 127 U. S., 160.
Wells v. Supervisors, 102 U. S., 625.
Concord v. Robinson, 121 U. S., 165.
Katzenberger v. Aberdeen, 16 Fed. R., 745.
Wheatley v. Covington, 11 Bush (Ky.), 18.
Henderson v. Covington, 1¼ Bush (Ky.), 312.
Kniper v. Louisville, 7 Bush (Ky.), 599.
Barnett v. Dennison, 145 U. S., 139.
Hill v. Memphis, 134 U. S., 205.
City of Newport v. Newport Light Co., 84 Ky., 166.
City of Newport v. Newport Light Co., 89 Ky., 454.

We have cited above the two cases of *Wheatley v. Covington, 11 Bush (Ky.), 18,* and *Henderson, etc. v. Covington, etc., 14 Bush (Ky.), 312.* These two Kentucky cases are upon the construction of the legislative grant of power to the city of Covington. They bear upon the power of a city, under its charter, to tax the citizens in order to build a bridge. In regard to the powers of the city, *the Court of Appeals of Kentucky held that, as the powers delegated are sovereign powers, only such powers as were clearly intended will be regarded as having been granted.* The Newport cases, above cited, are by the Court of Appeals of Kentucky, and go so far as to uphold contractual rights to exclusive privileges and franchises in a lighting company in a city of Kentucky. Those exclusive rights are maintained against a city ordinance.

Opposing counsel has relied vaguely upon section 3438, Kentucky Statutes, which is said by counsel to confer authority upon the board of public works, or upon the common council of the city, to regulate the water rates of the company. Counsel has contended that, in the absence of a board of public works, the common council can exercise the powers of such board. Counsel relies upon the latter part of said section 3438, Kentucky Statutes, as conferring upon the council, in the absence of the board, the power to control and fix the rates to be charged to private consumers by the company. That section reads as follows:

> "The board of public works shall have the exclusive power and control over the construction, supervision, cleaning, sprinkling, repairing, grading and improving of all streets, alleys, avenues, lanes, public cemeteries, parks, squares, fountains, wharves and landings, market houses and places, bridges, sewers, drains, ditches, culverts, streams, canals and water courses, sidewalks, curbing and the lighting of all such public places as may be

deemed necessary within the corporation; to fix and establish the grades of all streets, alleys, avenues and thoroughfares; they also have the power, supervision and control over the construction, repairing, cleaning, lighting and heating of all public buildings, and over all public improvements of the city. They shall have exclusive power to make all improvements and expenditures, within the revenue limits allowed by the council, which shall cost less than five hundred dollars, but shall let all contracts over fifty dollars to the lowest responsible bidder after due advertising. The said board shall have the exclusive power to organize and control the fire department, the work-house, the hospital, the almshouse, the city prison, and such works as the city may *own* for supplying the city or the inhabitants thereof with water, light, heat or power." (Our own italics.)

There is not a sentence or word in this section (3438) which gives the council or board any power to organize or control or manage any other works than those which the city may *"own"* for supplying the inhabitants with water. This section specifically confines itself to granting powers of control to a board or council over works which the city may *"own"* in its own right and title for supplying the inhabitants with water. The city in no way *owns* the works of or any interest in this company. This section (3438) is also a part of the act of the Kentucky Legislature of 1893 in regard to cities of the third class, to which the city of Owensboro belongs. We repeat that in 1889 the company had been incorporated, was in possession of its contract rights and franchises, and was furnishing water in the city of Owensboro, and all of its powers, privileges, rights and franchises had inured to it as the successor of the old *Owensboro Water Company.* The same application to the above Kentucky statute (3438) is asked for the important case of *Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed., 9, 10,* as was made

to section 3290 of the Kentucky Statutes. Section 3438 is far weaker in support of the city's claims than section 3290, and in both instances, under the *Pikes Peak case,* it must be held that the powers of the city are only over the regulations and rates of works of its *own* or works which it has *installed or enjoys by contract.*

It may be contended by the city that the power of fixing rates and making regulations, attempted to be exercised by the ordinance complained of, comes to the city out of its general or police powers if it does not come out of the powers conveyed in the statutes of Kentucky already discussed. Such a position can not be successfully held. Police powers constitute a broad subject, and we may safely state them to be *powers to make laws and regulations necessary for the protection of the comfort, health, morals, safety, convenience and general welfare of the public.* The question then arises whether the right of a city to cut private water rents, charged by a water company, half in two, is within such power. The ordinance complained of attempts to make a wholesale and arbitrary cut in the water rents charged by the company. Such proceeding by the city goes directly to the company's *contracts* and takes its property without due process of law and without equal protection of law. Counsel for the city may argue that, at least, the provisions of the ordinance in regard to meters are within the police power of the city. It must be remembered that the placing, under compulsion, of meters or the denial of the right to put in meters, is always and everywhere coupled in the ordinance with the unfailing and enforced plan of compelling the company to accept a ruinous reduction of its rates. *The meter is a hobby horse on which the city rides to the point of wholesale reduction of rates.* The enforcement of the meter is bound securely everywhere to the provision of *ruinously cheap water measured by a meter.* The real meaning of the *meter provision* is simply *unfairly cheap water running*

through a meter. The meter looks harmless, and it may be under certain circumstances, but the ordinance only hides behind the harmless meter to further its plan of *unjustly cheap water measured by meter.* The substance of all meter regulations in the ordinance is this, "the company *must* put in meters at certain places, *with reduced rates* for water measured in this way, and the company *shall not* put in meters in other cases, regardless of what the waste may be, without the consent of the consumer or the mayor." The gist of the ordinance is *wholesale reduction of rates*, and the meter is only applied to arrive at this wholesale reduction. If the city can not reduce the company's rates by direction, it can not reduce them by the indirection of meters. *Reduction* is what the ordinance arrives at first, last and always.

The attempt of the ordinance to compel the company to submit to the constant inspection of its private books, papers, accounts and records by the common council, and to compel the company to report its private business affairs to the officials of the city, is wholly out of the limits of police power. The city has no stock in the company. It is a stranger to the company, so far as private business affairs are concerned. An inquisition of private business accounts and affairs is not necessary to the *"protection of the comfort, health, morals, safety, convenience and general welfare of the public."* Such an inquisition by the city's officials can only mean "how much money are you making?" What does that matter to the officials so long as the service of the company is not against morals, safety, comfort, health, convenience and general welfare? Perhaps the city says, "I want to see your private books in order to regulate and reduce your rates." Here the city begs the question. We say to the city, "You have no right to reduce or regulate private water rates."

In *Lake Shore & M. S. R. Co. v. Smith, 173 U. S., 683-692,* Mr. Justice Peckham, considering a legislative re-

duction of prices to be charged for thousand-mile tickets by railroads, said, in part:

> "The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a *convenience*. As so defined, it would be more convenient if the right could be claimed without any compensation whatever. *But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public.* And, also, the convenience which the Legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others; nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word 'convenience,' it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket is improperly described as a convenience." (Our own italics.)

In New Orleans Gas, etc., Co. v. Louisiana Light, etc., Co., 115 U. S., 650, Mr. Justice Harlan, considering a city ordinance, which was alleged as violating exclusive and other rights of a gas company by a grant of a franchise to a competing company, said, in part:

> "Whatever, therefore, in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort or the public safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It can not be said with pro-

priety that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health and safety."

This case was one in which the contention arose that a denial to a State or city of the rights to disregard an exclusive franchise, and their right to grant a competing franchise, was depriving the State or city of its proper police or general power. Mr. Justice Harlan, as shown above, states clearly what things constitute the realm of police power. *The conclusion of the whole matter is that the police power of a State or city can not encroach upon rights secured by the Constitution of the United States.*

Walling v. Michigan, 116 U. S., 460.
Brennan v. Titusville, 153 U. S., 299.
In re Sam Kee, 31 Fed., 680.
In re Sing Too Quan, 43 Fed., 359.
In re Tie Loy, 46 Fed., 611.
In re Hong Wah, 82 Fed., 623.

We believe that the following doctrine is sound:

The police power is inherent in the State (the natural and original sovereign), but, in a city (an artificial and restricted sovereign), it exists only so far as the State has clearly granted it, by charter or statute, or as it is clearly necessary to or connected with the governmental nature of the city in protecting the public health, comfort, morals, convenience and welfare.

Wheatly v. Covington, 11 Bush (Ky.), 18.
Henderson v. Covington, etc., 14 Bush (Ky.), 312.

The Legislature of Kentucky has only, by its charter-statutes (sections 3290 and 3438, Kentucky Statutes), granted to Owensboro (a city of the third class) power to fix rates for and make regulations for works which the city *owns* or installs for itself or uses on *contract*. The city attempts, by its ordinance, to fix rates and regula-

tions for the company which it neither owns in its own right nor by contract. Smith, on The Modern Law of Municipal Corporations, section 1320, quotes from Horr & Bemis, Munic. Police Ordinances, section 211, to the following effect:

> "A grant of police power, however, can never be taken to authorize ordinances upon some subject which is partially or imperfectly given to the control of the corporation by an express grant, for the existence of the express grant shows that the legislative mind was specially directed to that subject, and the grant must be taken as the limit of its intention. And, where nearly all the ordinary police powers are made the subjects of express grants, only such additional ones can be exercised under a general grant of police power as are absolutely essential to the welfare of the community."

It is plain that the Legislature had granted to the city power to regulate and make rates for *works of its own* and works operated or controlled *on contract,* and that the subjects of fixing rates and rules had been granted so far and no further. Therefore, it is a reasonable rule to hold that the limited, but clear, grant of powers of control over certain kinds of waterworks excludes control, by statutory or police power, over the other and separate kind.

To close the matter of our contention in regard to the city's police power, we add that in 1889 the company began its life and labors under the contractual ordinance of the city (R., 25, 27, 28, 29, 30), which specifically granted the power to the company (R., 27) *"to make and enforce as part of the condition upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law or provisions of this ordinance."* This was a contract, made by the city with the old *Owensboro Water Company,* and the company, this appellee, in

1889, by special ordinance of the city (R., 30), became the successor of said old company, and successor to all rights, benefits, franchises and powers residing in said old company. It may be safely claimed that the contract-ordinance gave to the company full powers to make its own rules in regard to meters or in regard to how water should be furnished and in regard to the rates to be charged.

III.

The city must have clear and positive legislative authority in sections 3290 and 3438, or one of them, or under the general or police law, to fix rates, and the rates when fixed, under a clear power, must be so fair, reasonable and just as to allow the company to earn a fair and reasonable return upon its investment.

Munn v. Illinois, 94 U. S., 113, is a case upon which opposing counsel will be likely to base the proposition that the legislative or councilmanic body is the sole judge of the reasonableness of rates established, and that only in the absence of a statute must the courts determine what is reasonable. This doctrine has not only been modified in several subsequent decisions of the Supreme Court on the question, but has been absolutely revolutionized, so that now the rule is firmly established, by the Supreme Court itself, that the courts in all cases must determine whether or not rates established are reasonable.

In Stone v. Farmers' Loan & Trust Co., 116 U. S., 331, the court, speaking through Chief Justice Waite, who delivered the opinion in the Munn case, says:

> "From what has been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the State can not require a rail-

> road corporation to carry persons or property without reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law."

In Chicago, &c., Railway v. Minnesota, 134 U. S., 458, the court, speaking through Mr. Justice Blatchford, says:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States, and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

The Granger cases and the case of Budd v. New York, 143 U. S., 517, may be relied upon by opposing counsel. An examination of these cases discloses the fact that their effect is simply to hold that a *State* may regulate rates and charges, but the question of the reasonableness of these charges was not involved in either of these cases.

The Budd case is referred to in Reagan v. Farmers' L. & T. Co., 154 U. S., 399, in the following language:

> "Budd v. New York, 143 U. S., 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether

> the business (that of elevating grain) was within legislative control as to the matter of rates. It was said in that opinion: 'In the cases before us, the records do not show that the charges fixed by the statutes are unreasonable.'"

In Reagan v. Farmers' L. & T. Co., 154 U. S., 397, the court says:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation, by a common carrier, of persons or property, is a legislative or administrative rather than a judicial function, yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate, and, also, in the reverse case, to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the Legislature, instead of the carrier, prescribed the rates. The courts are not authorized to revise or change a body of rates imposed by the Legislature or a commission; they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

It is thus manifest that the dictum in the opinion in the Munn case, that the question of the reasonableness of rates was purely a legislative and not a judicial one,

has been absolutely changed by the Supreme Court. The proposition laid down by Blatchford, J., that the reasonableness of rates established is a judicial question, has since been approved, and has become the settled rule.

Lake Shore, &c., Ry. v. Smith, 173 U. S., 687.
Reagan v. Farmers' L. & T. Co., 154 U. S., 397.
Gas Light Co. v. Cleveland, 71 Fed., 613.
Sou. Pac. Co. v. Board of R. R. Commissioners, 78 Fed., 236.
Interstate Commerce Commission v. R'y Co., 167 U. S., 500.

On November 25, 1901, the Supreme Court of the United States handed down the decision in the case of Cotting, etc., v. Godard, etc., 183 U. S., 79. This case is familiarly called "The Kansas City Stock Yards Case." It appears in this case that on March 3, 1897, the Legislature of Kansas passed an act defining what shall constitute public stock yards, defining the duties of the person or persons operating the same, and regulating all charges thereof. This act provided penalties for the violation of its provisions. The main purpose was to have declared invalid the above-mentioned act of the Kansas Legislature, and the main objections to such act, made by the stock yards company, were, that the act fixed charges for driving, yarding, watering, weighing or handling cattle which were unfair, unjust and unreasonable, and which, if adhered to, would work the taking of property without due process of law, without just compensation, and would force the stock yards company into a great, unjust and ruinous loss.

This "Kansas City Stock Yards Case" is a review of the whole question of reasonableness, and there is hardly an important authority upon the subject which it does not mention, criticise and differentiate. The case seems to be, and is, a final settlement of contentions in the conclusion that *where there is a power* to fix rates, that power

must be exercised only in making such rates as are fair, just and reasonable, and that it is a question of a judicial nature whether such rates are fair, just and reasonable, and that enactments which do not fix such rates are void.

The original cost of the construction of the company, the amount expended in improvements and annual repairs, the amount and value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the rates prescribed, and the sum required to meet expenses, are all elements of inquiry and proper matters for consideration in arriving at what is reasonable and just.

San Diego Land Co. v. National City, 174 U. S., 757.
Smith v. Ames, 169 U. S., 546, 547.
Covington, &c., Turnpike Co. v. Standford, 164 U. S., 597.

IV.

We will, as briefly as possible, discuss the salient portions of the evidence going to show the value of the company's plant, its income, its bonded indebtedness, its expense, its depreciation and other matters affecting its earning capacity and bearing upon the unreasonableness of the rates which the ordinance attempts to saddle upon the company.

Mr. George Sidelinger testified for the company (R., 67). He is fifty-three years of age. He is the superintendent of the waterworks at Danville, Illinois. He has held his position there for eight years. He has been superintendent of waterworks in Kansas City and Grand Rapids. He has had experience in waterworks and in erecting waterworks in Massachusetts. He has made a thorough examination of the plant at Owensboro. He estimates that its cost of construction was $245,000 to $250,000. His

testimony shows him to be, in every respect, an expert upon waterworks.

Maj. Edward Hughes next testified for the company (R., 81). He is chief of the fire department at Louisville. He has held such position for twenty-one years. He has examined the plant at Owensboro *with respect to its capacity for fire protection. The plant is in excellent and thoroughly efficient condition for such purpose.* He is an expert upon fire protection.

Mr. Wm. J. McGonigale next testified for the company (R., 83). He is the secretary and treasurer of the company and holds the same office in several other water companies. He estimates the present value of the plant at Owensboro at **$235,000** to **$250,000**. He says that the annual operating expenses of the company are *$13,000.* The wear and tear, or depreciation, will amount to 3 or 4 per cent., which is *$9,000.* The taxes range from *$2,500* to *$3,000* per annum. He is familiar with the rules, regulations and rates of companies throughout the United States. *The rates fixed in the ordinance of March, 1900, are below the average rates throughout the country.* It would not be possible for the company to operate successfully without collecting its rates in advance. Any other method of collection would result in a loss of *fifty per cent.* He knows of no water company which does not collect in advance. There are between 1,200 and 1,300 consumers of water in Owensboro. *On the basis of the proposed ordinance the company would not receive revenue sufficient to pay its operating expenses and meet the natural wear and tear of the property, and would receive no return whatever upon the investment.* The ordinance would result in an actual loss of **$5,600** per year. This would be the result even if the company collected every dollar owing to it by consumers. The company has never paid any dividends to its stockholders, and he is in a position to *know this of his own knowledge.* The company lost money last

year. Under the proposed ordinance, the company would receive from domestic service *$11,500* per year, and from hydrant rental *$7,995*. The operating expenses are *$13,000* per year. The taxes at least are *$2,500* per year. The wear and tear, or depreciation, is *$9,000* per year. Even collecting its rates in advance, the company suffers a bad-debt loss of 20 per cent. The estimated loss, under the ordinance, of *$5,600* per year, did not take into consideration the uncollectible bills. The plant is in a most efficient condition as to fire protection. The bonded indebtedness of the company is *$235,000*. The gross income of the company for 1899 was about *$29,000*, and this included over *$2,000* received for water furnished in the previous year. The gross income for 1900 was over *$31,000*, and *$1,900* of this was for water furnished prior to 1900. During 1899 salaries amounted to *$4,139*. The bonded indebtedness of *$235,000* is secured by a mortgage on the plant, and the interest on the bonds is 5 per cent. per annum, except one lot of bonds worth *$5,000*, which bear 6 per cent. The interest account for the fiscal year of 1899 shows that the company paid *$12,064.95* for interest on its bonds. A reduction of rates by *33 1-3* per cent. will create a consumption of water which will increase the operating expenses. *$11,213.50* is the amount of the sinking fund charges. The company has been wisely and economically managed. If the ordinance were put into effect, the company would be forced to go into the hands of a receiver, as its loss would be great, and it could not stand such loss.

Mr. George J. Long next testified for the company (R., 103). He has been, all of his life, a manufacturer of water pipes. He has had considerable experience in the construction and management of water companies. He is now the president of a water company and is in active management of two others. He is able to estimate the value of the plant at Owensboro. He estimates the fair

cash value of the plant at Owensboro at **$225,000** to **$250,000**. It is in good condition. He is familiar with the past management of the plant at Owensboro. It is a well-managed property. He has examined the ordinance of March, 1900, and its enforcement would be ruinous to the company on account of the rates being too low. *The custom of water companies is to collect their rents in advance.* The ordinance of March, 1900, would compel the company to collect certain rates after the service had been rendered, and this would result in a great loss to the company. Such a plan as that proposed by the ordinance is not practicable. The plant at Owensboro can not be operated for less than *$12,500* per year as actual operating expenses. Three and one-half per cent. is a fair estimate for the wear and tear of the plant. He is not in any way interested himself in the plant at Owensboro. He has been interested in waterworks himself for over twenty years.

Mr. Alfred Walker next testified for the company (R., 109). He is in the waterworks contracting business, and has been for over forty years. He has built works in the large cities all over the United States, in Canada, and abroad. He has made a careful examination of the plant at Owensboro. The present fair cash value of that plant is, to-day, **$225,000** to **$230,000**. It can not be duplicated at these figures to-day. He is an expert in the value of labor and material for the erection of water plants.

Mr. Charles Hermany next testified for the company (R., 117). For forty-three years he has been actively engaged in the waterworks business in Louisville, Cincinnati, Nashville, Memphis, Bowling Green, Indianapolis, Milwaukee, Boston, Ft. Wayne and other places. Since 1860 he has been consulting engineer and designing engineer in the other places. He has made an examination of the waterworks system at Owensboro. The plant was in good and

efficient condition. He estimates the fair cash value of the plant at Owensboro at **$230,000.** *It is the universal rule, he says, of water companies to collect in advance, and there is a strong reason for this. The impressions made upon him are that the company, under the ordinance, if it were enforced, could not pay fixed charges.*

Mr. William Rudd next testified for the company (R., 125). He is an insurance agent in Owensboro. He has been in that business twenty years. On account of the improved efficiency of the fire protection from the water-works, in connection with the fire department, the insurance rates at Owensboro have been greatly reduced. The reduction of the rates of insurance was twenty-five per cent.

Mr. Asa Williams next testified for the company (R., 130). He is the engineer of the water company, and has been such for seven years. Gives detailed description of the water plant at Owensboro. Describes the pipe lines and the entire system. He displays and files a copy of the ordinance of March, 1900. The ordinance, according to his computation, would make a reduction in the receipts of the company of from thirty to fifty per cent. He says that the plant was remodeled about 1890, and the work of remodeling extended through three or four years. It was practically rebuilt. A new pump was put in. The pumps were put in separate wells. The works were duplicated, which is rendering them similar to works having two pumping stations, which are to be used in case there is a break-down. Before the election of the council which passed the ordinance, circulars were distributed in Owensboro promising that that council would reduce water rates.

Mr. Thomas Yeager next testified for the company (R., 148). He had been chief of the fire department at Owensboro for four years, up to the year in which he was testifying. He has been connected with the fire department of

Owensboro, more or less, since 1872. Since the refitting of the works the fire service has been all that could be required, and all that was needed or wanted by the city.

Mr. Henry Steubing next testified for the company (R., 149). He is the engineer of the waterworks at Evansville. He has been in the waterworks business since 1876. He is a civil engineer. He assisted in building the works at Louisville, Maysville and Evansville. He has made a careful examination of the plant at Owensboro. The cash value of the plant at Owensboro is **$257,000**. *It is as good a water plant as there is in the State of Kentucky.* He has examined the ordinance of March, 1900. The ordinance would reduce the collections of the company thirty per cent. *All the waterworks companies that he had ever heard of collect water rents in advance.* The rates fixed by the ordinance are lower than they are at Evansville. The rate of depreciation, or wear and tear, at Owensboro is about four per cent.

Mr. J. Tandy Ellis next testified for the company (R., 156). He is vice-president of the Owensboro Water Works Company. He resides at Owensboro. He had no notice, except a newspaper notice, of the intention of the council to pass the ordinance of March, 1900.

Mr. Owen Ford next testified for the company (R., 160 and 163). He is consulting and advising engineer. He has been retained in various enterprises for the planning, construction and building of waterworks in the United States and Mexico. He has constructed, or assisted in constructing, about two hundred water plants. The plant at Owensboro is in good condition, well designed, and is of modern construction and arrangement. In his opinion the fair cash value of the plant at Owensboro is **$250,000**. The depreciation, or wear and tear, of the plant is 3½ per cent. per annum. *The ordinance of March, 1900, is unreasonable with reference to the collection of water rates. The universal custom in all water plants is*

to collect in advance. Any other plan will result in great loss. The yearly cost of an economical running of the plant at Owensboro would be *$13,000*, not including the interest on bonds and taxes.

Mr. J. W. Holmes next testified upon interrogatories for the company (R., 167 and 172). He was engaged in the construction of waterworks from 1884 to 1892. Since that time he has been engaged in the manufacture of pipe and machinery for waterworks. Has made a thorough examination of the plant at Owensboro. He has most thorough knowledge of the plant in all its details. His evidence goes into the minutest details. He estimates the value of the pumping station at *$140,000*, and the value of the distributing system at *$140,000*. His total valuation of the plant is **$280,000**. He shows many details in regard to the reconstruction of the works.

Mr. Frank Schefold next testified for the company by interrogatories (R., 181 and 183). He has been engaged in the construction and operation of waterworks for over twenty years in various States of the Union. He is an expert on the cost of construction and operation of waterworks. He estimates the fair cash value of the plant at Owensboro at **$250,000**.

Then follow the witnesses for the city.

The first witness for the city was Mr. Charles L. Sturtevant. He is thirty-eight years old, and is a consulting engineer. He has designed and constructed several waterworks in various States. He estimates the cost of duplicating the plant at **$114,232**. And, strangely, then, in a few sentences after he makes this estimate, he values the works at a little more than **$76,000**. He does not know the rates which are charged in Louisville, Frankfort, Paducah, Nashville, Indianapolis or Knoxville. He has made no effort to compare the rates proposed by the ordinance with the rates in force in other towns in Ken-

tucky. *He is not familiar with the rules of any company in Henderson, Hopkinsville or any other Kentucky town.*

Mr. James P. Wiegal next testified for the city. He is superintendent of the waterworks at Henderson. He estimates the value of the Owensboro plant at $80,000. He says the expenses of running the plant at Henderson are $6,000 per annum. Henderson is a town of 12,000 people. The works at Henderson, for their construction, cost about $212,000.

Mr. Robert A. Cummings next testified for the city. He lives at Owensboro, and is a civil engineer and contractor. He estimates the cost of the plant at Owensboro at $119,981.25, and then strangely reduces the value of the works to a little over $87,000. Stranger still, he estimates the cost of duplicating the works at $124,500.

Mr. C. W. Bransford next testified for the city. He is engaged in the milling business at Owensboro. He is not satisfied with the price which he pays for water in Owensboro. He uses wells, which, he says, make a very cheap method for him of getting water to his mill.

Mr. Charles Broeker next testified for the city. He is in the milling business in Owensboro. He is not satisfied with the price which he pays for water at his mill. His mill is directly on the bank of the river. He gets his water easily and cheaply from the river at the door of his mill.

Mr. Charles A. Haney next testified for the city. He is chief of the fire department at Owensboro. He tells of the destructive fire at a warehouse filled with dried cornstalks, where he says that the water service would not extinguish the fire. He says that the stream of water would barely reach to the eaves of the roof of the building. He carried the nozzle up into a window. Then the stream of water reached a point which it would not reach at first. On cross-examination, he can not explain this strange

phenomenon in hydraulics and hydrostatics, that water will more than seek its level.

Mr. E. B. Shifley next testified for the city. He is the city engineer of Owensboro. He has had experience in laying pipe and constructing waterworks. He estimates the original cost of the plant at Owensboro at **$115,000.**

Mr. F. A. Ames next testified for the city. He is a carriage manufacturer at Owensboro. He has a factory which has an output of 5,700 carriages per year. He pays $5.00 a month for his water, and objects to paying that.

COMMENTS ON THE EVIDENCE.

The evidence of the company is presented by FOURTEEN WITNESSES. The evidence of the city is presented by EIGHT WITNESSES. The evidence of Mr. Charles Hermany for the company is that of a man known to this entire country as a finished expert upon waterworks matters. His reputation is universal, and he is a peer of the greatest waterworks engineers in America.

Maj. Hughes, chief of the fire department at Louisville, is the best authority upon efficiency of waterworks for fire protection.

Mr. McGonigale, for the company, testified as the only witness in the case who *knew* anything about the financial condition of the company. *He testified from the books of the company, and the books of the company were subject to the inspection of counsel for the city. He knows, with the books before him, that the depreciation is* $9,000 *and the total out-go is over* $30,000 *per annum.*

Mr. Sidelinger, Mr. Walker, Mr. Rudd and the others of the fourteen witnesses, are shown to be men who know what they are talking about from actual knowledge and experience.

Among the witnesses for the city are several dissatisfied manufacturers and councilmen. One of these has

an enormous plant, and pays $5.00 a month for water supplied to his plant. *He is thoroughly dissatisfied.* Another manufacturer has his factory standing on the bank of the river and prefers to get his water-supply out of the river. Water comes to him without much expense and without much trouble. He thinks the rates at Owensboro are too high. *The simian in a cocoanut tree can not understand evoluted man when he pays five cents apiece for cocoanuts!*

Mr. Haney, who testified for the city, is the chief of the fire department at Owensboro. He presents a novel proposition in hydraulics and hydrostatics. He says that the pressure would not throw the water to the eaves of the roof, but that, by carrying the hose one-half way up, *water will more than seek its level!* The fire, which it is alleged that the company's service could not control, was the conflagration of a warehouse filled with cornstalks, dried and ready for use at the cellulose factory.

Mr. Weigal, from Henderson, testifying for the city, says that Henderson is a town of *12,000* people, and that its works cost originally considerably over *$200,000.* Owensboro is a town of *18,000* or *20,000* people and *has much larger and better works than Henderson.* It is also true that the works at Henderson are owned by the city itself. He strangely puts the value of the works at the *little* town above that at the *big* town.

The evidence for the company is presented by a *larger* number of witnesses, and the character of their evidence is of a *clear* and *unimpeachable* nature.

V.

The ordinance complained of makes meter rates collectible only after the service has been rendered to the consumer. This is contrary to the contract of the city with the company, as evidenced by the ordinances of 1878 and 1889 (R., 25 and 30). The ordinance of 1878 was with

the *Owensboro Water Company*, and the present company, by the consent and adoption of the city, as evidenced in the ordinance of 1889, succeeded to all the rights of the original company (R., 30). This is conceded by the parties interested in this case. The ordinance of March, 1900, compels the company, contrary to the contract-ordinances of 1878 and 1889, to place meters with consumers who make certain demands for them. The ordinance of March, 1900, further compels the company to give written notice for ten days before shutting off water for nonpayment of rents. It also compels the company to submit its books and accounts at the end of each six months to the common council. For violation of the provisions of the ordinance the company is subject to a penalty. *All of these are rules and regulations upon which the company is to furnish water to consumers.* The contract-ordinances of the city with the company, of 1878 and 1889, are, in part, as follows (R., 27):

> "Sec. 9. The said company shall have the power and authority to make and enforce, as part of the condition upon which it will supply water to its customers, all needful *rules and regulations* not inconsistent with the law or the provisions of this ordinance.
>
> "Sec. 10. The said city will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition, and against injury to the hydrants rented by it to the said city, and against waste of water by consumers." (Our own italics.)

These ordinances of 1878 and 1889 are a solemn contract between the city and the company and give the company the right to make *"all needful rules and regulations"* with respect to its supply of water to the consumers of Owensboro. The city contracts to enforce ordinances to protect the company against imposition as to its regulations.

The ordinance of March, 1900, flies in the face of the contract-ordinances of 1878 and 1889, in that it takes away from the company the right to make its regulations for its supply of water. It clearly violates the solemn contract between the city and the company. We not only complain that the ordinance of March, 1900, fixes unreasonable rates and takes the property of the company, in violation of constitutional rights, but we show also that the regulations for the company, fixed by the ordinance of March, 1900, are contrary to and violative of the contract-ordinances of 1878 and 1889. The evidence will show, in an unmistakable manner, from the very best witnesses upon the subject, that the regulation of collecting rates only after service has been rendered will entail a serious loss to the company. Nearly every witness for the company testified to this fact. They were men who knew the waterworks business and spoke from experience. *We do not find that the evidence produced by counsel for the city even touches upon or denies that rates collectible only after the service is rendered would be harmful to the interests of the company. Upon this the witnesses for the city seem to be silent,* and the implication is that they know it to be a fact. *It is brought out strongly in all the evidence for the company, and must be recognized and taken as true.* It is a fact which common experience teaches. We recognize that such a ruinous regulation only applies to meter rates, but the ordinance of March, 1900, compels the placing of meters, and the obvious object of such compulsion is that the rates shall not be collectible in advance. The ruinous plan is gotten at in an indirect way, but it is clearly set up in the ordinance complained of. The plan would enable the shiftless and insolvent people of Owensboro to force the company to put in meters in order that they might be relieved of paying for their water in advance, and thus finally escape any payment whatever. Without further comment, we may confidently state that the contract-ordinances of

1878 and 1889, above quoted, clearly give to the company the right to make its *own rules and regulations* for supplying water to its customers. The ordinance of March, 1900, strikes at the plain meaning and attempts to violate the clear spirit of that contract. The provisions in the ordinance of March, 1900, compelling the company to give notice for ten days before it turns off the water of a delinquent is an open door for the escape of people who are not disposed to pay their debts. The subjecting of the books and financial affairs of the company every six months to the meddling of the city authorities is filled with populistic hindrances and troubles for the future. There is no regulation imposed by the ordinance of March, 1900, which does not hang a mill-stone around the neck of the company in the conduct of its internal affairs and in its relations with its customers and consumers.

VI.

We will, in detail, discuss the unjust and iniquitous provisions of the ordinance of March, 1900.

The *first* of these is compulsion, placed by the city upon the company, to furnish mills, manufacturing plants and other large establishments water at rates which experience has taught are far below the point where there is a possibility to make any profit whatever. The ordinance fixes a maximum yearly charge of $24.00 in cases where a certain amount of water is used, and it is possible, under such a condition of things, for a mill or factory or other plant to use a vast volume of water and still be liable for only $24.00 for the year's supply. A mill, factory or plant could, under these circumstances, turn in a flood of water from the pipes of the company and waste water to a ruinous extent and still not pay more than $24.00 per year. This would place the company at the mercy of the mills, factories and other plants enumerated in the ordinance.

This is surely contrary to the contract provisions of the ordinances passed in 1878 and 1889. The original contract-ordinance (R., 27) in favor of the company provided that *"said company shall have the power and authority to make and enforce, as part of the condition upon which it will supply water to its customers, all needful rules and regulations not inconsistent with the law or the provisions of this ordinance."* By that original ordinance the city agreed to adopt and enforce all means for the unmolested exercise of the rights and privileges and franchises guaranteed in said original ordinance, and especially against imposition upon the company by any one. The ordinance of March, 1900, invites imposition by mills, factories, hotels, distilleries and other large concerns by reason of the fact that the way is clear to a great waste of water, and a vast consumption of water, at the ruinous maximum rate of $24.00 per year.

The *second* respect in which the ordinance of March, 1900, is ruinous to the company is that it attempts to enforce unjust and unfair rates to private consumers where there is no meter used or no meter compelled or allowed. The evidence in this case has clearly shown that these rates to private consumers are unjust and unprofitable, and we will not discuss them further.

The *third* respect in which the ordinance of March, 1900, is ruinous and unjust is in the fact that it attempts to compel a supply of water to banks, stores, offices and other places of business, with the power in the consumers to compel the putting in of meters under a fine and penalty, without like power in the company to put in meters if necessary. The rule in regard to meters does not work both ways, and such rule is in violation of the original contract by the city with the company that the company should have the power to make its own rules and regulations as to the methods, ways and conditions of supplying water.

The *fourth* respect in which the ordinance of March,

1900, is unjust, unfair and ruinous is in the fact that it attempts to prevent the company from putting in meters where they are necessary and it is apparent there is waste, without the consent of the consumer or the mayor of the city. This is again a violation of the original contract-ordinance, under which the company operates, which gives to the company the right to *make rules and regulations as to the method and conditions of supplying water.*

The *fifth* respect in which the ordinance of March, 1900, is unjust and ruinous is in the fact that that ordinance does not allow the company to collect certain water rents in advance, and compels the company to extend hazardous credits to people of doubtful reputation and doubtful financial ability. It matters not how unable or unwilling a man is to pay for water supplied to him, the company must supply that water even with the certain knowledge that the water will be supplied at a total loss. The ordinance does not allow the taking of any money, thing or property, even as security, in such hazardous cases. Since 1889, when the company began its business in Owensboro, it has been collecting a good many of its water rents in advance, and such a rule was always recognized as a proper and binding rule under the aforesaid power of the company, guaranteed by the original contract ordinance of 1878, to *make its own rules and regulations in regard to supplying water to the inhabitants of the city.* The rule of collecting water rents monthly or quarterly in advance is a very necessary one in a good many cases and works well where a consumer is a permanent resident and uses so many hydrants, has so many rooms in his house, so many members of his family and so much stock in his barn. In cases of this kind the supply of water which is to be used can be well ascertained, and the rule of collecting rents in advance is a fair, just and reasonable one. Under the ordinance complained of, however, no questions can be asked about permanency of residence

or about ability or willingness to pay. The company must supply the consumer and wait until the end of the term to collect the rent, when the consumer has possibly removed from the city or is discovered to be absolutely insolvent. Such a condition of things does not allow the company to make or enforce *its own rules and regulations as guaranteed by the original contract-ordinances of 1878 and 1889.*

The *sixth* respect in which the ordinance of March, 1900, is unjust and ruinous is in the fact that it attempts periodically, and at all times, to expose the private books, accounts and affairs of the company to the inquisition of the common council of the city, and to force written reports of the private affairs of the company periodically before the council. Upon its face this is an outrage upon a private corporation and would subject the corporation to an endless chain of difficulties, dangers and troubles. It is certainly a needful rule that the company shall keep its own books and attend to its own affairs, and the contract-ordinances of 1878 and 1889 guarantee to the company the right to make *all needful rules and regulations with respect to carrying on its business.*

The *seventh* respect in which the ordinance of March, 1900, is unjust and ruinous to the company is in the fact that it attempts to compel the company, at its own expense, to lay pipes anywhere and everywhere in the city under all circumstances, at the mere whimsical request of prospective consumers, without guarantee or security of any kind. This forces the company to be subject to the whim of an alleged consumer when he notifies the company that an outlay of pipes is necessary to reach him and his alleged property at any point in the city. Such a rule might be a just one if it allowed the company to take some guarantee or security for the extra expense in placing new lines of pipe. The ordinance does not allow such guarantee or security, but compels the expense of laying new pipe lines

whenever and wherever an irresponsible consumer may request.

The *eighth* respect in which the ordinance of March, 1900, is unjust and ruinous is in the fact that it attempts to subject the company to fines and penalties, adjudicated and enforced by the city, for the violation of any of the provisions of said ordinance. This makes the city arbiter of almost every act of the company, and it is burdened with every conceivable injustice to the company.

CONCLUSION.

The average of the estimates made by the *many witnesses* for the company of the actual cash value of the plant at Owensboro, by the use of pencil and paper, is shown to be **$247,000**. The average valuation of the plant, according to the witnesses for the city, is **$109,000**. It is difficult to arrive at an exact average from the evidence of the witnesses for the city, for the reason that they draw a vague and uncertain distinction between the value of the works and what it costs to establish the works or duplicate them. Opposing counsel, in arguments in other courts, of his own free will and accord, *unsupported by the evidence*, however, frequently estimates the value of the works at **$90,000**. We may safely say that the average between the estimate of opposing counsel (*$90,000*) and the estimate of his witnesses (*$109,000*) is, in round and safe numbers, **$100,000**. Mr. McGonigale, for the company, assisted by the entire outfit of the books of the company, shows the following statement to be true:

Operating expenses	**$13,000**
Depreciation, or wear and tear	**9,000**
Present loss in bad debts (20 per cent.)	**6,200**
Taxes	**2,500**
Total out-go per annum	**$30,700**

Then we can safely say that $30,700 annually is what it costs to run the plant. *The evidence shows this clearly and plainly, and there is not a word in the evidence anywhere to break it down. This amount does not include interest on the bonds, which is $12,064.95. It does not include interest on the floating debt of $19,500. It only includes the actual operating expenses, the cost of repairs by reason of wear and tear, the loss by reason of bad debts contracted with people unable to pay their water rents, and the minimum taxes.* The maximum taxes are *$5,000.* These are the usual and legitimate and necessary expenses. They have nothing to do with the interest on the bonds, the floating debt or the interest on such floating debt. So then, by undisputed evidence, the necessary expenses of the company are $30,700 per annum. It is shown, and in nowise disputed, that the income of the company for 1899 was $29,764.29. It was shown in like manner that the income for 1900 was $31,577.43. These were the incomes for the fiscal years, and they include a large amount collected for water service rendered in previous years. Subtract $30,700 the actual running expenses, from $31,577.43, the maximum income of the company. This subtraction will show what we may call a net income of $877.43. Let us take the estimate of the value of the plant repeatedly made in the briefs of opposing counsel as a basis of calculation. His estimate is $90,000. The result is astonishing! ***We find that this so-called net profit of $877.43 is not one per cent. upon even the valuation placed by opposing counsel. It is not one per cent. upon $90,000. Is this unreasonable or unjust?*** We must remember that the works are unquestionably worth far more than *$90,000* or *$100,000,* and that the average estimate placed by the witnesses for the company is $247,000 *We must remember that our calculations do not take into consideration, in any way, the more*

than $12,000 *per year paid out as interest on the bonds, nor do we take into consideration the more than* $1,200 *a year paid to the sinking fund, nor do we take into consideration the floating debt of over* $19,000 *and the interest thereon.* The witnesses, without any dispute, estimated the reduction of income which would be brought about by the enforcement of the ordinance at from *thirty to fifty per cent.* Opposing counsel, by the import of his questions to the witnesses, places the reduction of receipts, under the ordinance, at *33 1-3 per cent.* He asks questions of the witnesses in which he incorporates that estimate as a basis of his questions. At any rate, the reduction brought about by the ordinance in the total receipts from the customers of the company would be *somewhere between thirty and fifty per cent.* On a basis of a reduction of even thirty per cent. the company would lose *$3,300* per year. This would entail a loss upon the company which would be ruinous, and if forced to undergo such a loss it would be compelled to give up all hope. According to the above, the company can not make one per cent., and if thirty per cent. of its receipts were taken away from it, it could not possibly figure out anything else than a great and ruinous loss. *If it should exist at all, it would be forced to exist for charitable purposes, and its stockholders would become public benefactors. We would reiterate that we have made our calculations upon the basis of the value of the plant fixed by our opponents.* We have not considered the bonds or the floating debt. We have granted our opponents, for the sake of argument, a perfect landslide of concessions. If we should argue the matter upon the basis of the average estimate of the value of the plant ($247,000), fixed by the witnesses for the company, we would show startling results in our favor. For the sake of argument we do not do this, but confine ourselves to undisputed evidence and to figures set by counsel and witnesses for the city. It must be remembered that Mr. McGonigale, the secretary

and treasurer of the company, was cross-examined by counsel for the city, and the books of the company were before the representative of the city. The only book that was absent was a small stock-book which had not been called for, and counsel for the city had full opportunity, by proper process, to see and examine all the books of the company. *There is no word in all the evidence to contradict the evidence of Mr. McGonigale as to the expenses of the company and as to the income of the company.* Opposing counsel was fishing after information, and it is no fault of any one that he caught fish which were not to his taste. By implication, he would have the court believe that the company is conducted on an extravagant plan, but he has produced no evidence to prove extravagance. The guesses of several witnesses, as to what it *ought* to cost to operate the company, are the only things upon which opposing counsel can rely.

In conclusion, we will say that we have not lost sight of the fact that we have a right to take into consideration the bonded indebtedness of the company as well as its floating debt, together with the sinking fund and the interest on the bonds and other debts. The cases which we have cited, under the proper head, bear us out in considering such things, *but we have seen fit to put the case, under the evidence, to this Honorable Court on the fighting ground of opposing counsel, and our computations have left out of consideration the large expense of paying interest upon the bonds and other debts.* We are clearly entitled to consider them in arriving at what is just, fair and reasonable in the way of rates. San Diego Land Co. v. Nat. City, 174 U. S., 757; Smith v. Ames, 169 U. S., 546; Covington v. Sanford, 164 U. S., 597.

We have shown (1) that the Federal court had jurisdiction. We have established (2) that the city had no right, by statute or police power, to pass the ordinance of March, 1900. We have established (3) that the rates fixed by the

ordinance are unreasonable. We have established (4) that, if the city had the right to fix rates at all by ordinance, those rates should be reasonable. We have established (5) that in consequence of the lack of power to make rates or regulations and the lack of reasonableness of rates the ordinance is void. We have established (6) that an enforcement of the ordinance will impose loss and ruin upon the company. We have established (7) that the ordinance of March, 1900, is violative of the contract-ordinances of 1878 and 1889 in attempting to impose regulations for the company's service, and violative of the company's constitutional rights.

Therefore we ask the Honorable Court to affirm the judgment of the circuit court.

Respectfully submitted,

SWEENEY, ELLIS & SWEENEY,
BINGHAM & DAVIES,

Attorneys for Owensboro Water Works Company, of Owensboro, Ky.

W. W. DAVIES AND
ROBERT W. BINGHAM,
Of Counsel.

Supreme Court of the United States

October Term, 1939

No. 18

City of Owensboro,

Appellant,

v.

Owensboro Water Works Company, of Owensboro, Ky.,

Appellee.

BRIEF FOR APPELLEE

William T. Ellis,

Counsel for Appellee.

Sprouley, Ellis & Sweeney,
Bingham & Dunn,
Of Counsel.

(6)

Supreme Court of the United States

OCTOBER TERM, 1903

No. 58

City of Owensboro, ... *Appellant*

v.

Owensboro Water Works Company, of Owensboro, Ky., ... *Appellee*

BRIEF FOR APPELLEE

MAY IT PLEASE YOUR HONORS:

Under rule 21, adopted by this court, appellee is not required to make a statement of its case, unless the statement of appellant is controverted. Supposing appellant will make substantially the same statement of its case here it made in the circuit court of appeals, where this suit was at one time pending, and believing that statement to be inaccurate and misleading, appellee, availing itself of the right given by the rule *supra*, submits the following which it believes to be a fairly accurate statement of the case which Your Honors are asked now to review.

I.

STATEMENT.

The common council of Owensboro, on the nineteenth day of March, 1900, passed an ordinance entitled "An ordinance to fix and regulate water rates, prices and charges for water furnished consumers in the City of Owensboro, and for other purposes." (Record, pages 31-35.)

1. The ordinance fixes the prices at which water should be furnished to private consumers for domestic and other purposes.

2. That consumers, in lieu of the rates fixed in the ordinance, may require persons, firms or corporations to attach a water meter to the pipe leading into the premises and that thereafter the consumer shall pay for the water furnished the minimum rate as shown by such ordinance fixing meter rates, etc. The same section provides that the person, firm or corporation furnishing water shall not, in any case, attach a meter unless the consumer demands it, except as the mayor of the city, after hearing the evidence, may so order.

3. The ordinance provides that persons, firms or corporations furnishing water shall not collect the water rates fixed therein or any part thereof in advance, except as the consumer may choose voluntarily to pay same.

4. It is further provided that each person, firm or corporation furnishing water shall keep an exact, complete and true account of all its incomes, gains and receipts from every source

whatever, and a complete and true account of all its expenditures, showing date of each and every item of expenditure and expense, etc., and that the books of the persons, firm or corporation so furnishing water, containing said accounts, shall be open at all times to the inspection and examination of the common council, and that a return shall be made to the common council at the end of each six months, which return shall be verified by the oath of the president, secretary and treasurer of those furnishing water, etc.

5. It is provided in section 5 that individuals, firms or corporations furnishing water shall, on written application of any person along the lines where their pipes extend, furnish water to the persons so applying within ten days thereafter.

6. The eighth and last section of the ordinance, the validity of which is questioned on this appeal, is crowded with drastic penal provisions. That section provides if any person, firm or corporation engaged in furnishing water to consumers in the City of Owensboro shall demand, charge, exact or receive directly or indirectly from any consumer as compensation or consideration for water furnished, any money, property or other thing of value over and above or in excess of the rates and prices for water herein named and prescribed, or shall fail or refuse for ten days without reasonable excuse to supply water as prescribed and required by section 7, or shall fail or refuse to keep the accounts, or the books required to be kept, or make the reports in writing to the common council, as required in the ordinance, such person, firm or corporation, so offending, shall be fined in a sum not less than $10.00, and not exceeding $50.00 for each offense.

Appellee is and was at the date of the passage of the ordin-

ance of March 19, 1900, a corporation created by and existing under the laws of the state of Kentucky. Its business was that of furnishing water to the City of Owensboro for public purposes, and to the inhabitants of said city for domestic purposes.

On the twenty-eighth day of March, 1900, appellee filed its bill in the circuit court of the United States for the district of Kentucky, seeking an injunction against the enforcement of this ordinance, or any part thereof. The grounds relied on for the injunction are fully set out in the bill. (Record, pages 3–38.)

AVERMENTS OF THE BILL.

The substance of the bill may be briefly summarized as follows:

1. The ordinance of March 9, 1900, is in violation of the contracts entered into between appellant and appellee on the third of June, 1889, as appear from resolutions, ordinances and contracts of that date.

2. In 1878 the City of Owensboro entered into a contract with the old water company, and when it renewed and extended that contract with complainant on the third day of June, 1889, the city had no power or authority under its charter in force on either of those dates to fix rates which the water company should charge private consumers, nor to prescribe the time when, or the conditions on which water rents should be paid.

3. The City of Owensboro by ordinances and contracts granted complainant's predecessor and assignor and the com-

plainant, the right to establish rules and regulations and to fix water rents to be charged private consumers and to prescribe the manner and mode of paying such rents.

Acting on the faith of these ordinances and contracts, appellee's assignor and appellee expended large sums of money in the construction and maintenance of their water works system, and had in operation in the City of Owensboro on the nineteenth day of March, 1900, an efficient system of water works of the actual cash value of $250,000, as the bill alleges.

4. Under the city's contract with appellee and under its charter it has the right to furnish water to the city for fire protection and to furnish private consumers with water throughout its entire corporate existence, which expires June 3, 1914.

It is insisted in the bill that under the ordinances passed by appellant city end under the contracts entered into between it, the appellee and its assignor, that it has the exclusive right to furnish the city with water for public purposes and to furnish the inhabitants thereof with water for domestic purposes, and that it has the right to fix rates at which it will furnish water for domestic purposes for the entire period of its corporate life, which will expire on the third day of June, 1914.

5. Appellant did not have under its previous charters, any power to fix water rates to be charged to private consumers, or to prescribe the time when, nor the manner in which the payment of such water rents should be made.

6. It is charged in the bill that the ordinance complained of is in violation of section 10, Art. 1, of the Constitution of the United States, which prohibits any state from passing any law which impairs the obligation of contracts, and that the ordinance,

if enforced, will impair the obligation of the contract between appellee and appellant city.

7. It is also charged that the ordinance is unreasonable and unjust and was passed without notice to appellee, that the rates fixed are so low that if enforced, appellee would not only be deprived of any income on its plant, but would be obliged to operate it at an actual loss, and that it would thereby be deprived of its property without compensation and without due process of law, which is in violation of section 1, Art. 14, of the amendment to the Constitution of the United States, which forbids any state to pass any law depriving any person of his life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws.

8. It is insisted in the bill that the penal provisions of the ordinance are unreasonable, excessive and oppressive and in violation of the Constitution of the United States, and the various amendments thereto, cited in the bill.

9. The prayer of the bill is for an injunction against the city, that it be restrained from enforcing any part of the ordinance or in any manner interferring with complainant's business, and that the ordinance be adjudged void. A preliminary injunction was granted which on final hearing on all the facts was made perpetual and the City of Owensboro has brought the case here on appeal.

II.

ARGUMENT.

The merit of the objections urged by appellee against the ordinance of March 19, 1900, will appear from an examination of the various ordinances and resolutions passed by the City of Owensboro and the contracts entered into by it with the present appellee and its predecessor.

On the ninth day of September, 1878, the City of Owensboro having no water works system of its own and being, not only without adequate fire protection, but without any sufficient means of furnishing its inhabitants with water for domestic purposes, entered into a contract with a corporation known as the Owensboro Water Company, which for convenience will hereafter be referred to as "old water company," to supply the city with water for fire protection and to furnish its inhabitants with water for a period of twenty-five years. (Record pages 25–29.)

The old water company began business on the day of its organization, which was September 9, 1878. Under the resolutions, ordinances and contracts already referred to it constructed a complete system of water works in the City of Owensboro and from the date of its organization up to and including June 3, 1889, it supplied the city through its water hydrants ample fire protection and provided its inhabitants with water for domestic purposes.

The capital stock of the old water company was fixed at $80,000. The rights, privileges and powers of the old water

company and the nature of its business are accurately stated in its articles of incorporation.

Record pages 23, 24, 25.

Simultaneously with the organization of the old water company and as an inducement to it to embark so large an amount of capital in a new and untried enterprise, the City of Owensboro passed an ordinance authorizing it to occupy all the streets and alleys of the city for the purpose of laying its pipes and water mains and for maintaining and operating its system of water water works in the City of Owensboro, for the purpose of supplying the city and the inhabitants thereof with water during its corporate existence.

The ordinance recites that among the considerations for its passage were the benefits to be derived by the city and its inhabitants from the construction and operation of water works, in consideration of which certain rights, privileges and franchises were granted the old company for the full period of its corporate existence.

In addition to this, the city by an ordinance rented from the old water company fire hydrants for the term of its corporate existence and obligated itself to pay for the use of such hydrants the sum specified in the contract, and to take water from such additional hydrants as it desired at the price named in the ordinance.

Sections 9, 10 and 14 of the original ordinance confer on the old water company, among other things, the power and authority to make and enforce as a part of the conditions upon which it would supply water for domestic purposes, all needful rules and regulations. It is further stipulated in the ordinance that the

city would adopt and enforce ordinances protecting the company in the safe and unmolested exercise of the franchises granted and against fraud and imposition.

It is also provided by the ordinance that it should be regarded and treated as a binding contract upon the City of Owensboro *and that after its acceptance the ordinance should be the measure of the rights and liabilities of the city and the water company.*

Record pages 25, 26, 27 and 28.

The ordinance was accepted by the old water company on the day of its passage.

Record page 29.

On the faith of the ordinance and the contract above referred to the old company installed its water works system in the City of Owensboro and entered upon the performance of its part of the contract by furnishing the city water for fire protection and water to private consumers for domestic purposes.

It expended large sums of money in the construction, maintenance and operation of its works. The extent to which the old company expended money, the character and efficiency of the works it installed appear in this record to which specific reference will be made hereafter.

From the date of the contract between the City of Owensboro and the old water company, up to the third day of June, 1889, it maintained and operated system of works under the ordinance passed by the City of Owensboro and in virtue of the contract it had with the city.

The population of the city having grown, the demands of both the city and its inhabitants for larger supplies of water having increased, it became apparent that the then system of works

should be extended and that more capital was necessary for that purpose.

This was the joint judgment of the old water company and the common council of the City of Owensboro.

ORGANIZATION OF APPELLEE COMPANY.

About the thirtieth day of May, 1889, appellee was created a corporation under the general laws of the state of Kentucky under the corporate name of "Owensboro Water Works Company, of Owensboro, Kentucky."

The nature and extent of its business, the amount of its capital stock, the time for which it was to exist, its rights and powers and authority appear in its charter.

See record pages 23-25.

So much of appellee's articles of incorporation as are pertinent to the questions involved on this appeal are as follows:

> "Sec. 4. The general nature of the business proposed to be transacted by the said corporation is to acquire the water works *of the Owensboro Water Company*, a corporation organized and existing under the laws of the state of Kentucky, and its contract for supplying the City of Owensboro and its inhabitants with water, and to maintain and operate water works in the City of Owensboro, county of Daviess and state of Kentucky, for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes."

The capital stock of appellate company is fixed at $390,000. Its board of directors was given the power to increase the capital stock from time to time to an amount not exceeding $500,000.

By section 6 of appellee's articles of incorporation it is provided:

> "The time for the commencement of the said corporation is the first day of June, 1889, *and it shall terminate twenty-five years thereafter, subject to such extension of its terms of existence as may be by law provided.*"

Appellee, as appears from section 4 of its charter, proposed to purchase the old water power company and to become the assignee of its contracts, rights and franchises, but it declined to do so until it could first obtain the consent of the City of Owensboro for that purpose.

On the third day of June, 1889, appellant city, by its common council, adopted the following preamble:

> "Whereas the Owensboro Water Works Company of Owensboro, Kentucky, a corporation duly organized, and existing under the laws of the State of Kentucky, is ready to purchase the water works of the Owensboro Water Company, *together with its existing contracts for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water, and whereas it is desired by the said two companies in order that the said purchase may be consummated, that the City of Owensboro grant to the said Owensboro Water Works Company of*

Owensboro, Kentucky, the franchises and license to maintain, complete and operate a water works in the City of Owensboro and to use the streets, alleys and other public highways within the city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and that the City of Owensboro accept the Owensboro Water Works Company of Owensboro, Kentucky, as the successor to the contract made by the City of Owensboro with the Owensboro Water Company for hydrant rentals; NOW, in order to enable the said companies to carry out their negotiations and to vest the contracts of the Owensboro Water Company for hydrants as fully in the said Owensboro Water Works Company, of Owensboro, Kentucky, as if they had been originally made by the City of Owensboro with the said Owensboro Water Works Company, of Owensboro."

Be it ordained by the common council of the City of Owensboro:

"Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of said corporation, to maintain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro the

streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water.

But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use, from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and said grant is subject to the existing right of purchase of said water works by the said City of Owensboro.

Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the City of Owensboro hereby accepts the said Owensboro Water Works Company, of Owensboro, Kentucky as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company, as fully as if said existing contracts had been originally made by the City of Owensboro with the said Owensboro Water Works Company of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

Sec. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company, of Owensboro, Kentucky, and upon such consummation the mayor and city clerk of the City of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the City of

Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, of Owensboro, Kentucky, and to accept the other in behalf of the City of Owensboro when signed and sealed by the said the Owensboro Water Works Company, of Owensboro, Kentucky.

Sec. 4. This ordinance shall take effect at its passage and publication.

JOE LEE, Mayor.

PHIL R. ZULAUF, Clerk."

(Record, pages 30 and 31.)

THE ORDINANCE OF JUNE 3, 1889.

By the ordinance of June 3, 1889, consent is given by the City of Owensboro that appellee may purchase the water works of the old company, together with its existing contracts for supplying the City of Owensboro and its inhabitants with water.

The City of Owensboro likewise agrees that the franchises and licenses "to maintain, complete and operate water works in the City of Owensboro and to use the streets and alleys and other public highways within said city for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water," shall be assigned to appellee.

By this ordinance the city accepted appellee as the successor to the contract made by it with the old water company for hydrant rentals, as fully as if it had been originally made by the City of Owensboro with appellee.

In the first section of the ordinance consenting to the purchase by appellee of the old water works, it is provided as follows:

> "That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Ky., of the water works of the Owensboro Water Company, the franchises and licenses are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, *for and during the existence of the said corporation*, to maintain, complete and operate water works in the City of Owensboro, Kentucky, for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water."

By section 2 it is among other things provided, in consideration of the purchase by appellee of the Owensboro Water Company, the City of Owensboro accepts it as the successor to the contract for hydrant rentals existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with said Owensboro Water Works Co., of Owensboro, Ky., without the intervention of said Owensboro Water Company. That the city had this power and that appellee acquired the

rights of the old water company by this assignment is sustained by the following authorities: Columbia Water Power Co. v. Columbia, 5 S. C. N. S. 225; Carlyle v. Carlyle Water, Light, &c., Co., 36 Ill. App. 28; Austin v. Bartholomew, 46, C. C. A. 327; Armor Water Works Co. v. Farmers Loan & T. Co., C. C. A. 133.

(Record pages 30 and 31.)

The court will see that the present appellee not *only obtained the consent* of appellant city to purchase the water works together with its contracts and franchises, *but that appellee was granted all the rights, privileges and franchises* which had been granted to the old water company.

Moreover, under section 1 of the ordinance above referred to this grant to appellee was to it, "its successors and assigns, *for and during the existence of said corporation.* * * *"

The capital question here involves the right of the City of Owensboro, during the corporate life of appellee to fix prices or regulate rates to be charged by it to the private consumers of its water, in view of its contracts with appellee and its assignor.

In order to ascertain whether or not such right exists it will be necessary for the court to consider what rights were granted to the old company with respect to fixing the rates it would charge its private consumers for water, for whatever right it had in that respect, was assigned to appellee, which assignment was ratified by appellant. The further question here is as to what rights, privileges or franchises were granted to appellee under the ordinance of June 3, 1889.

Appellee contends it was given the right for and *during its*

entire corporate existence to maintain and operate its water works system in the City of Owensboro and to prescribe the rules, regulations and terms on which it would furnish water for private or domestic purposes.

It not only secured by the consent of the City of Owensboro, all the rights, privileges and franchises of the old water company but all the rights, privileges and franchises granted to the old company were in express terms granted to appellee and those rights were granted for the period of appellee's corporate existence.

On the faith of the ordinance and the contract entered into between appellant and appellee the latter insists it acquired the right, not only to furnish water for fire protection, but for domestic purposes, and to prescribe the terms and conditions on which it would furnish such water, to private consumers, which necessarily implies the right to fix the rates.

In ascertaining whether or not this is sound the court will consider, in addition to the contract ordinance, what power, right or authority appellant city had at the time the contract ordinance was passed, to fix water rates to private consumers, for the parties will be held to have contracted with reference to law as it then existed.

If the city had no such right, at that time, it has no such right now, unless by some provision of a subsequent charter such right *is expressly conferred* and then the question of impairing the obligation of the contract will necessarily remain for determination.

It becomes an interesting question as to what right the City of Owensboro had under its charter in 1878, or in 1889, to fix

water rates to be charged by corporations or individuals to consumers for domestic purposes.

The charter under which appellant existed at the time the original contract was made in 1878, as well as the charter under which it existed when it consented to appellee's purchase and entered into the contract with it, conferred no power or authority on the city to fix the prices at which the corporation should supply water to private consumers for domestic purposes.

If this position is sound it follows that the attempt on the part of the City of Owensboro to pass the ordinance of March 19, 1900, was a nullity and that the judgment of the circuit court enjoining it from enforcing any one of the provisions of that ordinance ought to be affirmed, though the city under a charter subsequently granted may have had such right.

But appellee will not rest its case alone upon the ground that the city at the time of making the original contract with the old company and at the time it made the contract with appellee had no power or authority to fix the price at which the water company should supply private consumers with water, but will insist that though such power may have existed in the city, still in virtue of the ordinances and contracts it could not during the existence of appellee's corporate life, legally have passed the ordinance in question.

POWER OF THE CITY TO FIX WATER RATES IN 1878.

When the City of Owensboro entered into the contract with the old water company on September 10, 1878, it was existing

under a charter approved February 16, 1866, and various amendments thereto.

Under that charter the only power the city had with respect to providing water or fixing water rates is found in the following language:

> "To make, establish and regulate public wells, cisterns, reservoirs and pumps, and to provide for the furnishing of the said city and the inhabitabts thereof with gas and water." (Record, p. 4.) (Sessions Acts, Kentucky Legislature, 1876, vol. 1, p. 551.)

We will try to show hereafter that the city at the time it made the contract with the old water company had no power under its charter to erect works of its own, or to fix the rate which any private corporation furnishing its inhabitants with water should charge them for such service.

Having contracted both with appellee and its assignor under charters which conferred no authority on the city to fix water rates, the ordinances and contracts entered into between the city, the old water company and appellee, are binding upon appellant during the entire corporate existence of appellee.

THE CHARTER OF 1882.

At the date of the organization of appellee the City of Owensboro was existing under a charter approved the eighteenth day of March, 1882, entitled "An act to create a new charter for the City of Owensboro." (Record, page 3.)

The only powers conferred on the City of Owensboro under the charter of 1882 with respect to supplying water to the inhabitants of the city is contained iu section 10, sub-section 20, which is as follows;

> "To make, establish and regulate wells, cisterns, reservoirs and pumps, and to provide for the furnishing of the city and the inhabitants thereof with water and gas."

The power to fix water rates to private consumers is exactly the same as that contained in the charter of 1876.

Nowhere in the charter of 1876, nor in the charter approved April 18, 1882, is there any power or authority conferred on the common council of the city to fix or regulate the rates which a private corporation should charge consumers for the water it might furnish them.

The power conferred in those charters is to establish and regulate wells, cisterns, reservoirs and pumps for the purpose of providing the city and inhabitants with water and gas.

But the power to furnish, or to employ an individual or corporation to furnish water does not carry with it the power to fix the rates at which water shall be furnished when the service is rendered either by an individual or a corporation. In such case and in the absence of an express contract the individual or corporation furnishing water for domestic purposes may charge whatever seems right and reasonable.

It is certain the city cannot prescribe, without the consent of the individual or corporation furnishing water, the prices to be

charged private consumers, and that is precisely the thing attempted to be done in the ordinance of March 19, 1900.

Of course the water company being a public service corporation could not charge rates which would amount to an extortion, and the consumer would have his remedy, but the fact that a private consumer may have a remedy in such a case is no argument whatever to establish the proposition that the common council of a city which has no authority under its charter, may fix the rates to be charged, as was attempted to be done in this case.

A municipal corporation can exercise the following powers and no others:

1. Those granted in express words.

2. Those necessarily or fairly implied in or incident to the powers expressly granted.

3. Those essential to the delegated object and purpose of the corporation, not simply convenient or indispensable.

> "Any fair, reasonable doubt concerning the exercise of power is resolved by the courts against the corporation and the power is denied."
>
> Dillon on Municipal Corporations, 2 ed., section 89.
>
> "A municipal corporation has no implied powers from the mere fact of its creation to engage in the business of supplying its citizens with water for pay. *It cannot do so except by virtue of express legislative authority.*"
>
> White v. Meadeville, 177 Pa., 645.
>
> "Supplying water to a town or city is not a public

function. The power of a municipality to furnish water is derived wholly by act of the legislature."
Re Long Island Water Co., 14 N. Y., Supp. 807.

In City of St. Louis v. Bell Telephone Company, 2 Lawyers Reports Annotated, 278, the question was: did the common council of the city of St. Louis have "power *to fix telephone charges?*"

Under statute law of Missouri, the city had the general power *to regulate the use of the streets, to license, tax and regulate lawyers, doctors, telephone companies, and* all other business, trades and avocations whatsoever.

It was contended because the city had the power to *regulate the use of streets* that that gave it the power to *regulate telephone rates.*

Answering this argument the supreme court of Missouri said:

> "The company is subject to reasonable regulations prescribed by the city as to planting poles, stringing wires, &c. Such regulations have been obeyed by the defendant. Conceding all this, we are at a loss to see what this power to regulate the use of streets *has to do with the power to fix telephone charges.*
>
> The power to *regulate the charges for telephone service* is neither included in, nor essential to the power to *regulate* the use of streets and the ordinance cannot be upheld on any such ground." (Italics are ours.)

To the same effect is the case of the Lewisville National Gas Company v. State of Indiana, 131 Ind. 49.

55 Kansas, 744.

The same doctrine has been announced by the court of appeals of Kentucky in the following cases:

Henderson v. City of Covington, 14 Bush 312;

City of Newport v. Newport & Cin. Bridge Co., 90 Ky., 194;

Mayer v. Lexington, 1 Ky. Law Rep. 69.

On the authority of the above cases and on general principles, appellee insists the City of Owensboro at the time it made the contract with the old water company and at the time it made the contract with appellee, having only the power to establish public wells, cisterns, reservoirs and pumps, and to provide for the furnishing of the city and the inhabitants thereof with gas and water, had no power or authority whatever to fix the rates at which any corporation, though a public service corporation, should charge private consumers for water.

If the city had no such power at the time the contracts and ordinances already mentioned were passed, then it will be held to have contracted with the old water company and appellee, with respect to the powers it had at the time and the law as it then existed, and no subsequent act enlarging the city's powers in the matter of fixing water rates to be charged to private consumers would authorize it to pass the ordinance complained of here.

CITIES OF THE THIRD CLASS.

We do not understand it is contended the City of Owensboro had authority under its charters in force at the time of the con-

tracts and ordinances involved in this case were passed, to fix the rates which individuals or companies, engaged in furnishing water for domestic purposes, should charge private consumers.

But on the fourteenth day of June, 1893, the City of Owensboro, was, under the general laws of the state, created a city of the third class. (Kentucky Statutes, sections 1063 to 1144.)

It was argued in the lower court, and is argued here, that appellant city, acquired under section 3290, sub-section 5, of the charter creating it a city of the third class, the power to pass the ordinance of March 19, 1900. Before considering whether the power claimed was in fact conferred by the act creating appellant a city of the third class, we call the court's attention to the following provisions of the charter creating Owensboro a city of the third class, wherein it is provided :

> "That the repeal of any act by the provisions of this law shall not in any wise be so construed *as to affect any right or liability acquired, or assumed thereunder, by or on the part of the city or any person or body corporate.*"

If it were conceded the city under its present charter had the legal right to fix the rates at which corporations or individuals should furnish water for domestic purposes, the fact would remain, if such water company or individual had a contract with the city under previous charters, its rights under such contracts could not be impaired, or in any wise affected by the terms or provisions of the present charter.

The general assembly of Kentucky was careful enough when

it came to establish cities of the third class to preserve all rights, franchises, privileges and liabilities acquired or incurred under previous charters.

This part of the city's present charter was of course merely declaratory of the common law, for without that provision the charter of a city of the third class would be so construed, but the court is not left to construe appellant's charter on this point, for by its express terms its provisions cannot affect any right previously acquired or contract previously made.

Appellee's rights are secured under the ordinances and contracts of September 10, 1878, and June 3, 1889, therefore the powers of the common council of the City of Owensboro under its present charter to fix water rates are in fact not involved on this appeal.

SECTION 3290, SUB-SECTION 5, KENTUCKY STATUTES.

By sub-section 5, section 3290, Kentucky Statutes, it is provided that cities of the third class shall have the right :

> "To provide the city and the inhabitants thereof with light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city, to make regulations for the management thereof and to fix and regulate the prices to private consumers and customers."

It is under this supposed authority the City of Owensboro, being a city of the third class, asserts the power to pass the ordinance of March 19, 1900. An examination of the authority conferred on the city in the sub-section referred to will leave little room to doubt, we think, that power to pass the ordinance in question was not in fact conferred on the common council. But the city asserts said power was conferred.

How many cities of the third class under sub-section 5 of the section quoted, provide its inhabitants with water, &c.? The answer is furnished in the sub-section itself.

It says a city of the third class may provide its inhabitants with water, &c., (1) by contract; (2) by works of its own, located either within or beyond the boundaries of the city. It may make a contract either with an individual or a corporation to supply water, or if it chooses, it may supply its inhabitants with water "by works of its own." Since there are but two modes by which a city of the third class may supply itself and its inhabitants with water, the inquiry is, what may it do in case it has exercised either one or both of the two modes by which it is authorized to furnish itself, or to supply its inhabitants with water?

The power of appellant to pass the ordinance in question is carefully and accurately considered by the learned district judge who granted the injunction herein.

Record pages 55 and 56.

In his opinion the court discusses the power of appellant under sub-section 5, section 3290, to pass the ordinance in question.

The argument there presented is so succinct and clear,

and need not be repeated, but we ask Your Honors to examine the reasoning of the learned district Judge, on this point.

In concluding its opinion, the court says:

> "The legislature may doubtless amend the complainant's charter and thereby itself fix, or else authorize the city by ordinance to fix or regulate prices in a lawful manner, but we are clearly of the opinion the legislature has not exercised, or attempted to exercise that power through section 3290." Record p. 56.

The above is quoted from the court's opinion on the motion for an injunction pendente lite.

In its final opinion making the injuction perpetual (Record pages 322-323) the court says:

> "Since the injunction pendente lite was granted in this case a good deal of evidence has been taken, more or less pertinent to the issues of fact raised by the pleadings, but upon the view I have been compelled to take of the case, this decision must turn upon the question discussed, in the opinion granting the temporary injunction, which I need not repeat. I would only add that time and reflection have more fully confirmed my conviction that the grounds upon which that decision was put are incontrovertible.
>
> The enforcement of the ordinance of the city, which we have held to have been unauthorized and void, would by the operation of such enforcement, take from the complainant certain portions of its money or prop-

erty without due process of law and without compensation, and would thus deny to it the equal protection of the law, in violation of the constitution of the United States.

The views of the court in its former opinion are reiterated and as the City of Owensboro had no authority to pass the ordinance, the complainant is entitled to the relief prayed for.

We need not go into a discussion of the other propositions which might arise upon the bill and answer.

Even if the city be without legislative authority to do what the ordinance undertakes to do, yet the case being properly here, the court may grant full relief prayed for as it has jurisdiction of the action as presented upon the face of the bill." Schunk v. Moline & Co., 147 U. S. 500; Scott v. Donald, 165 U. S. 58.

THE CITY OF OWENSBORO HAD AUTHORITY TO ENTER INTO CONTRACTS WITH THE WATER COMPANIES TO SUPPLY IT AND ITS INHABITANTS WITH WATER FOR PUBLIC AND DOMESTIC PURPOSES.

When the City of Owensboro entered into the contract with the old water company on the tenth day of September, 1878, it had the power under its charter to make such a contract.

By the 9th section of the contract ordinance of September 10, 1878, it is provided:

"And said company shall have the power and authority to make and *enforce as a part of the conditions upon which it will supply water to its consumers all needful rules and regulations not inconsistent with the law or the provisions of this ordinance.*"

By section 13 of the same ordinance it is provided as follows:

"In consideration of the benefits which will be derived by the said city and its inhabitants by construction and operation of said water works and in further consideration of the risk of so large an investment by said company in said city in a new and untried enterprise, the rights, privileges and franchises hereby granted to and vested in said company shall remain in force and effect for twenty-five years from the passage of this ordinance. And the city hereby rents from said company for the uses herein before set out one fire hydrant at each intersection of streets along the lines of pipes hereinbefore mentioned."

By section 14 it is among other things provided as follows:

"*And after such acceptance this ordinance shall be the measure of the rights and liabilities of the said city and of the water company.*" Record, pages 27 to 29.

When these three sections are considered it will not be questioned that the old water company was in express terms granted

the right to fix the rates at which it would furnish private consumers water.

That right by the terms of the ordinance extended throughout the corporate existence of the old company.

Special attention is directed to that part of section 14 which provides, that after the acceptance of the ordinance the rights and liabilities of the city and the water company are to be measured by the terms thereof.

The old water company accepted the ordinance as required. Record page 29.

The rights of the parties being fixed by the contract any attempt on the part of the city thereafter to fix the rates or to prescribe the conditions on which the company should furnish water for domestic purposes was an impairment of the obligation of the contract.

On the third of June, 1889, the City of Owensboro extended the rights, privileges and franchises it had theretofore granted to the old company and contracted with appellee it should have same rights, privileges and franchises that had been granted the old water company, for twenty-five years from that date which contract appellee accepted.

When that contract was accepted it became binding upon both parties and appellee acquired the right, during its entire corporate existence, not only to furnish water for domestic purposes, but to do so on the terms and conditions fixed in the original contract between the city and the old water company and the ordinance was and is the measure of the rights and liabilities of the city and appellee. The contract between the city and the old water company must be read into the contract between the city and appellee for it is a part of it.

This being true it follows that the attempt to pass the ordinance of March 19, 1900, was in violation of the contract between appellee and appellant and is therefore void no matter what authority the city may have had under its charter at that date to fix water rates.

We have seen that the city had no power either on the tenth of September, 1878, or on the third of June, 1889, by the charter under which it then existed to fix water rates. But it had the power to provide by contract for the furnishing of water both for public and domestic purposes.

The city's power to make the contracts relied on by appellee has not at any time in the course of this litigation been challenged, nor do we suppose its power so do so will now be questioned.

Looking at the ordinance of June 3, 1889, it appears that the same rights, privileges and franchises which the City of Owensboro had granted to the old water company were likewise granted to appellee, and those privileges and franchises by the terms of the contract with appellee were granted to it for the entire term of its corporate existence.

Section one of that ordinance is in these words:

> "That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, *the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assignee, for and during the existence of said corporation, to maintain, operate and com-*

plete water works in the City of Owensboro and to supply the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro, the streets, alleys and other public highways thereof for purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water."

By section 2 of the ordinance of June 3, 1889, it is provided that "the City of Owensboro accepts appellee as the successor to the contract for hydrant rentals as fully as if such contract had been originally made by the city with appellee," and in addition the city granted appellee for the term of its entire corporate existence all the rights, privileges and franchises it had granted the old water company in 1878 and these rights, privileges and franchises were to continue for a term of twenty-five years from June 3, 1889.

In other words, appellee succeeded, under that ordinance, to all the rights, privileges and franchises which were originally granted to the old water company and those rights by the terms of the ordinances and resolutions were to continue for and during the entire corporate existence of the present appellee, which corporate existence will not expire until the fourteenth day of June, 1914.

LAWS IN FORCE AT THE TIME AND PLACE OF MAKING THE CONTRACT ENTER INTO AND FORM A PART OF THAT CONTRACT.

To emphasize the position contended for by appellee to the effect that the common council of the City of Owensboro was without power to pass the ordinance of March 19, 1900, and that the ordinance is void, we ask the court to keep in mind the fact that at the time these contracts, resolutions and ordinances were made and adopted, the city, under its then charters had no power or authority to fix rates to be charged private consumers for water, no matter what appellant's rights may have been in March, 1900.

Being without such power, yet having the authority to contract with individuals or corporations to furnish water for public and private purposes, the parties will be held to have contracted with reference to the law as it then existed.

The city being without power to prescribe rates, it follows of necessity, as well as by the terms of the ordinances and contract, that the right to fix reasonable rates was vested alone in the water company.

> "Laws which exist at the time and place of making a contract, and at the place where it is to be performed affecting its validity and construction, *enter into and form a part of it.*" Walker v. Whitehead, 16 Wallace 314; Beach on the Modern Law of Contracts, vol. 1, section 734.

The City of Owensboro having no authority under its charters, at the time it passed the ordinance and made the contracts involved in this suit, to prescribe the rates which private consumers should pay for water, no subsequent legislative grant could give it that power. The exercise of such power would impair the obligations of the contracts and would be repugnant both to the constitution of Kentucky and the constitution of the United States.

There seems to be no room to doubt that the attempt on the part of the city in the ordinance complained of to regulate rates and fix prices which appellee should charge private consumers for water, and to fix the time and conditions on which such rents should be payable is plainly, an impairment of the obligation of the contracts between its predecessor and the appellee and the City of Owensboro.

This is true, regardless of the powers conferred on the City of Owensboro by its charter as a city of the third class.

The city in those contracts, resolutions and ordinances was acting in its individual or business capacity; it was not exercising a governmental function, and no subsequent council could repeal, modify or impair the terms of the contract thus made by a previous council, although the general assembly may subsequently have conferred on the city such power, and although the city may at the the time it passed the ordinance have acted under a power conferred.

Little Falls Electric Light & Water Company v. City of Little Falls, &c., 102 Federal Reporter, 663.

The Little Falls case was to enjoin the city from enforcing ordinances which the water company alleged impaired the obligations of the contract between itself and the city.

The city of Little Falls was empowered to contract for the construction of water works for the purpose of supplying itself and its inhabitants with water. The city contended that the contracts between itself and the water company were invalid because made for an unreasonable length of time and at rates which were unreasonably high.

The issue there was practically the issue presented here.

Answering the contention of the city, the court said :

> "Contracts on the part of a municipality for the supply of the municipality and its citizens with water and light are not made in the exercise of governmental powers vested in the municipal council, but in the exercise of its proprietary or business powers. In such cases it is acting for the private benefit of itself and its inhabitants, and its contracts of that character are governed by the same rules that govern contracts of private individuals or corporations."

At the time appellant made the two contracts relied on by appellee it was acting for the private benefit of itself and its inhabitants; it made the contracts in the exercise of its proprietary or business powers. Hence it follows that those contracts must be governed by the same rules of law which govern the contracts of private individuals and private corporations. It cannot be too often repeated that the City of Owensboro had the power to make the contracts, and having voluntarily entered into them, no fraud or unfairness being charged, the rights of appellant and appellee are to be measured as provided in section

14 of the ordinance of September 10, 1878, which in terms declares that "after its acceptance this ordinance *shall be the measure of the rights and liabilities of the said city and the water company.*"

The ordinance having been accepted, appellee and its successor having entered upon the performance of their part of the contract and expended large sums of money in carrying out the provisions of the contract, the right of appellee under its contracts with the city to fix rates at which it would furnish water for domestic purposes is undoubted, and all attempts on the part of the common council of the City of Owensboro to interfere with those rights is an attempt to impair the obligation of the contract which the law prohibits and the courts will not tolerate.

The district judge in his opinion granting the temporary injunction said:

> "The legislature may doubtless amend complainant's charter and thereby itself fix, or authorize the city by ordinance to fix or regulate prices in a lawful manner, but we are clearly of the opinion the legislature has not so exercised or attempted to exercise that power through section 3290."

Again, the court in making the injunction perpetual said:

> "However much the legislature might change that charter the city council of Owensboro could not do so without legislative authority even if such authority could be delegated to it at all."

The lower court holds that the city had entered into a contract with appellee and its predecessor, the terms of which could not be altered in any event, without legislative authority.

The court further expresses a doubt as to whether the legislature of Kentucky could have so amended the charter of appellant as to confer on it the right to alter the terms of the contract between appellant and appellee. The court of appeals of Kentucky has held it could not. Commissioners of The Sinking Fund v. G. and B. Navigation Co., 79th Ky., 73, and many other cases.

The city having made a valid contract no subsequent grant of power to it by the general assembly could authorize it to change the terms of the contract,

It was conceded in the lower court, if the old water company or appellee had a contract with the city wherein it and its predecessor were granted the right to fix rates of compensation for water furnished to private consumers that the terms of that contract could not be impaired during appellee's corporate existence. But it was contended that such contract was not made and sections 9 and 10 of the ordinance of September 10, 1878, were relied on to show that such right was not conferred.

Appellee insists that sections 9 and 10 and the preamble and resolution adopted by the city council when read together show that such contract was made and such right was conferred, but if the court dissents from this, appellee calls attention to section 14 of the ordinance of September 10, 1878, which says:

> "After such acceptance *this ordinance shall be the measure of the rights and liabilities of the said city and of the water company.*"

The case of Stone v. Farmer's Loan and Trust Company 116 U. S. 307, was relied on in the lower court. But that case sheds no light, as we believe, on the questions involved here. That case was a suit by a trust company, as receiver of a railroad against the state railroad commission to enjoin that body from fixing the rates it should charge for freight and passengers. This court in its opinion quotes section 12 of the railroad's charter, as follows:

> "12. That it shall be lawful for the company hereby incorporated, from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of persons or property on either railroads or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

After quoting this section the court says:

> "From this it is claimed that the state granted to the company for the full term of its corporate existence, that is to say, forever, the right of managing its own affairs and regulating its charges for the transportation of persons and property free of all legislative control.
>
> It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction unless restrained by *some contract* in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce."

The points of difference between the case reported in the 116 U. S. and the case at the bar appear on the surface. In the 116 U. S. case the railroad claimed it had a perpetual grant, that is a grant forever. Here appellee says its grant is limited to a term of twenty-five years.

In the 116 U. S. case it was conceded by the railroad that the state had, at the time it granted to it a charter, the right to regulate or limit the amount it could charge for the transportation of persons and property, and though it was granted by the terms of its charter, the right to fix and regulate charges to be made for the transportation of freight and passengers, it accepted its charter with the implied, if not the express agreement that the state had at any time the legal right to alter or amend its charter. But that rule has no application here.

In the first place appellant city had no power under its charters in force at the time the contracts relied on here were made, to fix water rates. In the second place appellee and its predecessor paid and agreed to pay the city a valuable consideration for the right to fix the prices at which they would furnish water to private consumers. In the 116 U. S. case the railroad paid nothing for the privileges granted it.

By section 13 of the ordinance of September 1, 1878, it is among other things provided :

> "In consideration of the benefits which will be derived by the said city and its inhabitants by construction and operation of said water works and in further consideration of the risk of so large an investment by said company in said city in a new and untried enter-

prise, the rights, privileges and franchises hereby granted to and vestel in said company shall remain in force and effect for tventy-five years from the passage of this ordinance, &c." Record, page 28.

The old water company accepted the contract between itself and the city, entered upon the performance thereof and continued in the faithful execution of its part of the agreement until June 3, 1889; at that time, in view of the growth of the city and the increased demands for water for both public and private purposes, it was the joint judgment of the city and the water company that the capital stock of the water company ought to be increased and that the facilities for supplying water ought to be extended.

The old water company had not fully completed its system of works as appears by reference to section 1 of the ordinance of June 3, 1889, wherein it is recited:

"The franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of said corporation to maintain, *complete and operate* water works in the City of Owensboro for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes &c."

This section shows the city was of the opinion the water works system should be enlarged and extended, to carry out

this enterprise additional capital was required and appellee was requested to furnish it.

The fact should not be overlooked that at the time appellee became the assignee of the old water company it had not *completed its system of works* and with a view to the final completion, extension and enlargement of the works all the rights, privileges and franchises formerly granted the old water company were granted to appellee for and during its corporate existence. Record page 30.

Reference to the resolutions, ordinances and contracts entered into between the City of Owensboro and appellee and its predecessor show the water companies were embarking in a new and untried enterprise. They were investing large sums of money. Whether those investsments would result profitably or disasterously was an unsolved problem. The city therefore deliberately contracted with the water companies, in view of the risk they then assumed, and in view of the magnitude of the enterprise in which they were then embarking that the water companies should fix the rates they would charge private consumers for water. This was an honest and fair agreement which we think the court will delight to uphold.

Having entered into the contract with the water companies, no matter what the power of the common council of Owensboro may at the time have been or may be now, appellee cannot be deprived of the right it acquired under that contract with the city for a term of years. The city in entering into the contracts, was in the management and conduct of its private affairs and was acting in a business capacity. It had the right to make the contracts, and if there was a valuable consideration, as we have shown, the city, like an individual, is bound by its contract.

In respect to its contract with appellee and its predecessor it stands upon precisely the same footing that individuals do in reference to their contracts, and it can pass no law which will impair its obligations.

If the ordinance, which is sought to be enjoined, can be enforced, the city, with the sanction of the courts, will be permitted not only to impair the obligation of its contract, but to take from appellee its property without due process of law and to deny to it the equal protection of the laws. Appellee would be willing to rest its case on the naked rule of law, arising out of its contracts with appellant, but the terms of the proposed ordinance are so unjust, inequitable and oppressive it feels authorized to make a final appeal to the facts as they appear in this record, for no matter what view the court shall take of the law of this case, on its facts the judgment of the lower court ought to be affirmed.

III.

THE ORDINANCE OF MARCH 19, 1900, IS UNREASONABLE AND UNJUST AND IF ENFORCED WOULD OBLIGE APPELLEE TO OPERATE ITS PLANT AT AN ACTUAL LOSS.

If the court holds appellant had authority to pass the ordinance in question which for the argument which is to follow, may be conceded and that appellee has no contract with the city by which it acquired the right to fix rates to be charged domestic consumers, still the judgment of the lower court should be affirmed on the facts.

The provisions of the ordinance of March 19, 1900, the rules and regulations therein prescribed are unjust, and if enforced, would result, not only in depriving appellee of the power to earn any income whatever on its investment but would result practically in the confiscation of its property. The evidence shows that the rates fixed, the terms and conditions on which water rents are to be paid, if enforced, would result in a large loss to the company, amounting annually to from $7,000 to $10,000.

To show the unreasonableness of the rates proposed in the ordinance, appellee took the testimony of thirteen witnesses, the substance of whose evidence is as follows:

1. George B. Sidelinger.

George B. Sidelinger, is the superintendent of the water

works at Danville, Ill. He has had large experience in connection with water plants in the various cities, having been superintendent of the water works system in Kansas City, Grand Rapids and other cities.

The witness examined appellee's plant about the date of the institution of this suit, and after a careful inspection of it, fixed the value of the plant at $245,000. He examined carefully the ordinance of March 19, 1900, and testified it would be impossible for the Owensboro Water Works Company or any other company to operate the plant and make a profit on its investment under that ordinance.

He says the prices fixed are too low and that the provision of the ordinance prohibiting the collection of water rates in advance, except when voluntarily paid, would result in a loss of from 40 to 60 per cent. annually. Record pages 67 to 80.

2. Edward Hughes.

Edward Hughes, who for more than twenty-one years before he gave his evidence had been chief of the fire department of Louisville, Ky., and who examined appellee's plant carefully, declared its condition to be perfect, and that the works were adequate in every respect to furnish complete fire protection to the City of Owensboro and its inhabitants. Asked to state how the City of Owensboro, in the matter of fire protection, ranked with other cities in the United States, said, "Equal to any. I consider the fire protection of the City of Owensboro from its water works system as first class." Record, pages 81 to 82.

3. William J. McGonigle.

William J. McGonigle, who had been connected with appellee corporation since June, 1897, in the capacity of auditor, secretary and treasurer, and who was perfectly familiar with the value of appellee's plant, testified that same was of the actual cash value of $235,000 to $250,000.

Discussing the terms and provisions of the ordinance the witness testifies that the company would be obliged to operate at a loss under its provisions. Record, pages 83 to 103.

4. George B. Long.

George B. Long, manager of the Louisville branch of the United States Cast Iron and Foundry Company, and who had been engaged in the manufacture of cast iron, gas, water and culvert pipes all his life, testifies that the value of appellee's plant is from $225,000 to $250,000. He is familiar with water rates, and says the provisions of the proposed ordinance, if enforced, would be ruinous to the company; that they are entirely too low, and that there are many other provisions in the ordinance which are objectionable, which he points out, and which, he says, would result, if enforced, in great pecuniary loss to the company. Record, pages 103 to 107.

5. Alfred Walker.

Alfred Walker, who resides in the city of New Albany, Indiana, and whose occupation is that of a water works and gas works contractor, and who had been in that business for over

forty years, says he has built water and gas works in East Indies, Ottawa and Toronto, Canada, and in many other cities both in Europe and the United States; testifies he is familiar with the cost of water works, and says the cash value of appellee's plant is $225,000 to $235,000. He examined the system and says he made a thorough examination of it, and on this point he says:

> "It is a very complete system of works, the most complete works I have seen since I have been on the continent of the United States; the only fault that I find is that it is not filtered; that is the only fault, and that is the fault generally of places that take water from the Ohio river." Record, pages 109 to 116.

6. Charles Hermany.

Charles Hermany resides in Louisville, Ky., is a civil engineer, has had large experience with water works. He has for forty-three years past been the superintendent of the water works system of Louisville, Kentucky; says he examined appellee's plant about the date of the institution of this suit. He made a careful estimate of its value and fixed the value of the water pipes, hydrants, gauges, &c., at $120,000; pumping station, machinery and apparatus thereto belonging at $110,000, making a total value of the plant of $230,000. Speaking of the rule prevalent among water companies in the matter of collecting water rates, witness says it is the almost universal rule to collect water rents in advance from periods varying from three months to a year in advance.

The witness testifies that he had carefully examined the ordinance complained of and if its provisions were enforced "that the company could not pay its fixed charges out of the revenues which such an ordinance would afford, &c." Record pages 117 to 121.

7. William Rudd.

William Rudd, an insurance adjuster, residing at Owensboro, testifies that by reason of the efficiency of the service furnished by appellee, the rates of insurance have been reduced twenty-five per cent. and that Owensboro is, in the matter of fire protection, rated as a first-class city. Record pages 125 to 128.

8. Asa Williams.

Asa Williams, an engineer, in the employ of the Owensboro Water Works Company, and who is perfectly familiar with its pumping station and pipe system, which is over twenty-seven miles in length, accurately describes the whole system, states its efficiency and fixes its value. Record pages 129 to 148.

9. Thomas Yager.

Thomas Yager, who was chief of the fire department in the City of Owensboro for four years preceding the year 1900, says, "the efficiency of the water works system was all that was required, it furnished as good pressure of water as was needed." Record pages 148.

10. Henry Steubing.

Henry Steubing, a civil engineer, superintendent of the water works at Evansville, Ind., says, "I made a careful examination of the whole Owensboro plant, going over the engine house, boiler house, and map of the pipe system here in Owensboro." When asked to state the fair cash value of appellee's plant in the City of Owensboro in April 1900, he says, its cash value on that date was $257.000.

The witness testifies that he examined the ordinance passed by the City of Owensboro nineteenth of March, 1900. Discussing the result to the company from the enforcement of the ordinance he says the single provision of the ordinance which prohibits the collection of rents in advance would result in a loss to the company annually of fully thirty per cent. Referring to the rates fixed in the ordinance the witness testifies that the water works system of Evansville is owned by the city and that an examination of the ordinance proposed shows the rates fixed therein are lower than the rates at Evansville. (Record pages 149 to 158.)

The court knows that in cases where municipal corporations own their own works rates are fixed as low as they can be and not with a view of earning any profits whatever. The statements of this witness leaves no room to doubt that the rates fixed in the ordinance complained of deny appellee any income whatever on its investment.

11. Owen Ford.

Owen Ford, who is a consulting and supervising engineer,

testifies that he has constructed and assisted in constructing about two hundred water plants in the United States and in Mexico. He is familiar with the cost of building, constructing and operating such plants. He says he examined appellee's plant about the first of April, 1900, and says its fair cash value at that time was $250,000.

He says the annual depreciation of a plant like appellee's resulting from operation and natural wear and tear is about three and one-half per cent.

Discussing the ordinance in question witness declares the rates fixed are unfair and inequitable; that they are much lower than the rates charged in other cities of similar size.

Mr. Ford further states that he has had occasion to examine into the rates charged in various cities for the special purpose of ascertaining and using same in the course of his business, that he has examined the rates charged by both muncipal plants and plants managed by private corporations, and that the rates named in the ordinance here are unreasonable and much lower than rates in force in similar cities throughout the country.

He says the ordinance is unreasonable in prohibiting the collection of water rates in advance, that the conditions in the ordinance relating to collection of water rents, as to the time and manner of collecting them is unreasonable and if enforced the result would be a loss so great as to render the successful operation of the plant impracticable.

In his evidence this witness shows that to operate under the terms of the ordinance would result annually in an actual loss to the water company. Record page 166.

12. J. W. Holmes.

J. W. Holmes, resides at Bessemer, Alabama, and is manager of the United States Cast Iron Pipe and Foundry Company's plant at that place. This witness says he has been engaged in the construction of many water works and reconstructed the water works system at Owensboro. He is perfectly familiar with appellee's plant, its original cost, its condition, and its present cash value, which he says is $280,000.

Witness testifiess he is familiar with water rates usually charged in cities of the class to which Owensboro belongs and that the rates the company adopted on the first of April, 1896, and which are yet in force are not higher than the average rates charged in other cities throughout the United States. Discussing the ordinance of March 19, 1900, the witness says, the rates therein fixed are unreasonable and unjust and if enforced "would be *equivalent to confiscating the property of the Owensboro Water Works Company of Owensboro.*" The witness points out in detail the various features of the ordinance which are unseasonable and unjust and discloses what loss would result from denying appellee the right to collect its water rents in advance.

The court's attention is specially called to Mr. Holmes' discussion of that provision of the ordinance which requires that a meter be placed for any person upon application and demon-

Record pages 172 to 179.

13. Frank Schefold.

Frank Schefold, who is a water works engineer residing in New Albany, Indiana, testifies that he has been engaged in the

construction and operation of water works plants for over twenty-five years last past, has built water works systems in Illinois, Kentucky, Indiana, Tennessee, West Virginia and Ohio, and that he is familiar with the cost of constructing and operating such plants in the United States.

Mr. Schefold testifies that he made a thorough examination of appellee's plant during the month of March, 1900, that he considers it superior to any plant he ever saw for the size of the city, that the machinery is above the average of the kind used in such cities, of a very modern plan and well constructed. This witness fixes the cash value of appellee's plant at $250,000; the value of the pipe system at about $125,000, and the value of the pumping station therein at about $125,000.

He says the depreciation resulting from the prudent operation of a water works system is about 3½ per cent. per annum. He examined the ordinance proposed and declares the rates therein are entirely too low to permit the operation of appellee's plant. He says they are lower than any rates in his experience of plants which pay their own running expenses. He also testifies that he has examined a great many rates in cities of similar size, operated by private corporations, and the rates fixed by the ordinance, are, he says, *unreasonably low*. He also states that some of the rates fixed in the ordinance are so low that they would not pay the expenses of the service pipes and maintenance of same and collection of rents therefor, and the rates are far lower than any other rates charged by plants in towns the size of Owensboro, and that there are no reasons why a plant at Owensboro can furnish water any cheaper than in other cities of similar size. Discussing the provision of the ordinance which

prohibits the collection of rents in advance, except when paid voluntarily, the witness shows the unreasonableness of its terms. According to this witness it will cost annully $25,000, under an economical management, to operate the plant at Owensboro and the revenue as shown by other witnesses which could be earned under the ordinance proposed would not amount to more than about $17,000. (Record pages 183 to 187.)

WILLIAM J. McGONIGLE'S EVIDENCE ONCE MORE CONSIDERED.

We have seen that Mr. William J. McGonigle, who is not only the auditor, secretary and treasurer of appellee company, but likewise holds the same positions for the Danville water works company, of Danville, Illinois, the water works company of Defiance, Ohio, and for the water works company at Frankfort, Ky., is in a position to state with great accuracy not only the value of appellee's works, the annual cost of operating the plant, but the reasonableness of the terms of the ordinance proposed.

We invite the attention of the court to what he says on these subjects and quote from his evidence as follows:

"Q. 25. What is the amount of hydrant rental which the Owensboro water company receives at present from the City of Owensboro annually?

A. $7,595.

Q. 26. Has the company any other source of rev-

enues besides that earned from the city for hydrant rentals and from its private consumers?

A. No.

Q. 27. On the basis of the proposed ordinance; would the Owensboro Water Works Co. receive a revenue sufficient to pay its operating expenses, natural wear and tear of the property and any return on its investment?

A. In my opinion it would not.

Q. 28. In your judgment what would be the net annual loss to the company operating under this ordinance?

A. $5,600.

Q. 29. Do you assume in making that answer that the water company would collect all of its rates under the proposed ordinance?

A. That result is arrived at provided every dollar is collected from its consumers.

Q. 30. Mr. McGonigle, are you in a position to state whether or not the Owensboro Water Works Company has ever paid any dividends to its stockholders?

A. I certainly am.

Q. 31. Has the company at any time paid any dividends to its stockholders?

A. Never.

Q. 34. Under the proposed ordinance what would be the amount the company would receive from domestic service?

A. $11,500.

Q. 35. From hydrant rental?

A. $7,595.

Q. 36. What is your estimate of the operating expenses of the Owensboro Water Works Company?

A. $13,000.

Q. 37. And for taxes?

A. $2,500.

Q. 38. And for depreciation?

A. If I remember rightly I estimated it at $9,000, and I have no reason to change that now.

Q. 39. That is estimating that every dollar for domestic service would be collected?

A. Yes, sir.

Q. 40. Can you state what is the per cent. of loss on domestic service when collecting its rent in advance?

A. In the neighborhood of twenty per cent.

Q. 42. Did or not your estimate of $5,600 as a net annual loss to the company from operating under the proposed ordinance include any estimate for uncollected bills?

A. Oh no, I did not include the estimate for uncollected bills, that as I stated would be the result provided every dollar was collected.

Q. 43. In your judgment what would be a reasonable estimate of the uncollected bills if the company should operate under the proposed ordinance.

A. I can surely say we would lose in the neighborhood of $2,000 per year of the revenue."

Record pages 86 and 87.

The quotations from Mr. McGonigle's evidence show that to operate the water works plant under the proposed ordinance the company would be required to do so at an annual loss of $7,600.

No witnesses were introduced to contradict the statements of this witness. On the contrary the twelve other witnesses introduced by appellee corroborate his statements.

The court is hence brought face to face with the proposition that if the ordinance in question is enforced appellee will not only earn no income whatever upon $250,000 of capital it has invested, but will be required to operate its works at a loss and thus it will be deprived of its property without due process of law and denied the equal protection of the law.

WHAT THE PROOF ESTABLISHES.

A review of the evidence of the thirteen witnesses to whose testimony reference has been made establishes the following facts:

1. Appellee's plant was at the date of the passage of the ordinance sought to be enjoined, the most complete and efficient system of water works ever installed or operated in any city of the population of Owensboro, and was, at that date, of the actual cash value of $250,000.

2. The service it rendered both for public and private purposes was first-class.

3. The water rates fixed by appellee in 1897, which were in force at the institution of this action were reasonable and below the average rates charged by cities of like population.

4. That under a prudent and economical management of the plant, the operating expenses, wear and tear, repairs, county state and municipal taxes amounted annually to $25,000.

5. That the company has never been able to pay any dividends to its stockholders.

6. That under the proposed ordinance no more than $17,000

per annum could be earned by the company. Hence it would be obliged to operate at an annual loss of say $7,000.

7. That the terms and provisions of the ordinance in question are unreasonable and unjust. The rates fixed by it are so low that the company cannot operate its plant except at the loss above stated, and its provisions as to when rents may be coerced and with respect to attaching meters, find no parallel in the regulations prescribed for any water company in the United States or elsewhere.

If these propositions are established by the proof, and we say they are, it follows that no matter whether the common council of the City of Owensboro has, under its present charter, the right to fix the rates of compensation to be charged to private consumers or not, the fact remains that the ordinance it seeks to enforce ought to be enjoined, because if it is enforced appellee will, without reference to its contracts with the city, which we have discussed in a former part of this brief, be deprived of its property without due process of law. Its property will be taken without compensation and it will be denied the equal protection of the laws.

The evidence offered by appellee is practically uncontroverted. The only opposing testimony is that of Charles F. Sturdevant, who, though a consulting civil engineer, has no actual knowledge of the nature or value of appellee's plant.

Appellant also took the deposition of Robert A. Cummins, who, at the date he gave it was in the employ of appellant. Cummins fixes the value of appellee's property at $124,500. Record, page 235.

The witness Sturdevant estimates the cost of defendant's sys-

tem at $111,840. The witness James P. Weigal fixes the value at $80,000.

These are the only witnesses introduced by appellant, who speak of the value of appellee's works.

Reference to their testimony shows that they were practically without information as to the value of the works, and that their testimony in no wise affects the succinct and intelligent statements made by the thirteen witnesses introduced by appellee. None of appellant's witnesses speak of the reasonableness of the rates proposed in the ordinance.

The remaining question then is, assuming the common council of Owensboro had the right to prescribe water rates, which right it is here asserting, whether or not the terms proposed are reasonable; for granting the common council of Owensboro has the right to prescribe water rates, the major fact is that it must prescribe reasonable rates. It cannot prescribe rates so low as to prevent the water company from realizing a reasonable income on its investment, that would be in violation of the provisions of the federal constitution, so often referred to in this argument.

THE REASONABLENESS OF RATES FIXED BY MUNICIPAL CORPORATION OR BY THE LEGISLATURE OF THE STATE MAY BE REVIEWED BY THE COURTS.

Though a municipality is acting under an express legislative grant authorizing it to fix rates, nevertheless if the rates

fixed deprive the corporation of the reasonable earnings to which it is entitled, the courts have jurisdiction to enjoin the enforcement of such an ordinance.

When it is claimed the rates fixed by the common council of a municipality for the furnishing of water will deprive the corporation furnishing it of reward, the courts may ascertain whether the power has been carried beyond the constitutional limits, and if so, declare the act void.

> "The court is not limited to the evidence produced before the common council or other body authorized to fix the rates, and may act without knowing what such evidence was.
>
> Whether the action of the council or other body was beyond the constitutional limits *is a mixed question of law and fact* to be determined by the courts upon evidence produced before them. San Diego Water Co. v. City of San Diego, 118 Cal. 556.

In that case the constitution of California conferred on municipalities the right to fix rates of compensation to be charged by water companies. The single question there was as to the reasonableness of the rates fixed in the ordinance. Considering that question the supreme court of California says:

> "The power of the state to fix and regulate rates of compensation to be charged by persons and corporations in charge of certain public utilities *is so limited by the constitution of the United States* that it cannot be so

exercised as to require the furnishing of property or services without reward."

This is the point appellee, under this branch of the case, is urging against the validity of the ordinance in question.

"If rates are fixed by legislative power or authorized by proper judicial proceedings in which full notice and opportunity to be heard are given, it is still within the province of the courts to review such question to the extent at least of determining whether the rates so fixed will furnish some reward for the property used and the services rendered. To fix rates which will not allow such reward is to take property for public use without compensation." 118 Cal. 556.

In the case at the bar appellee was never given any notice of the proposed passage of the ordinance in question; it never had any opportunity to be heard before the legislative body which passed it.

It insists that the rates fixed in that ordinance not only deprive it of reasonable compensation, but would, if enforced, oblige it to operate its plant at an actual loss.

In the 118 California case, the court further says:

"When it is claimed that the rates fixed by the common council of a municipality for the furnishing of water will deprive the corporation furnishing it of re-

ward, the courts may ascertain whether the power has been carried beyond the constitutional limits, and if so declare the action void."

It follows from the authority above referred to that the question of fact as to the reasonableness of the rates fixed in this ordinance is open for review by Your Honors.

WHAT IS REASONABLE COMPENSATION.

In determining the compensation to which a water company furnishing water to a municipality and its inhabitants is entitled, neither the sum for which the appellee's works could be sold in the market nor the cost of replacing them is controlling, for the money the company has reasonably expended for the public benefit in erecting its works is entitled to a reasonable reward.

> "If the business appears to be honestly and prudently conducted, the rate the company should be compelled to pay for borrowed money would furnish a sufficient though not always a safe criterion which would be deemed reasonable."

In discussing the compensation a water company is entitled to receive, the supreme court of California, in the case quoted says:

> "The fact that some reward or compensation is allowed to a water company for water furnished the mu-

nicipality, is not conclusive of the power of the court, the question of just compensation is a judicial question to be determined by the ordinary course of judicial proceedings. Whenever the rates fixed by the common council of a municipality are grossly and palpably insufficient to furnish such revenue as will afford compensation redress may be had in the courts." 118 Cal. 556.

RATES WHICH SHOULD BE ALLOWED.

"In fixing the water rates the common council should provide for just and reasonable compensation to water company. The rates ought to be adjusted to the value of the services rendered and this means that the company should be allowed to collect only a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency and declare a dividend to stockholders *equal to at least the current rates of interest, not on the* par value of the stock but on the actual value of the property necessarily used in providing and distributing the water to consumers." Reagan v. Farmers Loan, &c., Co., 154 U. S. 362.

The doctrine announced by the supreme court of California in the case referred to is approved in the 154 U. S.

In Chicago, &c., R. R. Co., v. Minnesota, 134 U. S., 418, this court says:

"If the company is deprived of the power to charge reasonable rates for the use of its property, and such

deprivation takes place in the absence of an investigation by judicial proceedings, it is deprived of the lawful use of its property, and this in substance and effect is the taking of the property itself without due process of law, and in violation of the constitution of the United States, and in so far as it is thus deprived while other persons are permitted to receive reasonable profit, upon their invested capital, the company is deprived of the equal protection of the law."

In Stone v. Farmers Loan, &c. Co., 116 U. S. 307, this court says:

"From what has been said it is not to be inferred that this power (the power to regulate rates) or limitation or regulation is itself without limit. This power to regulate is not a power to destroy, the limitation is not the equivalent of confiscation under pretense of regulating freights and fares, the state cannot require a railroad corporation to carry persons without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or due process of law."

The same doctrine is declared in:

Banking Company v. Smith, 128 U. S. 174.

Rued v. N. Y., 143 U. S., 517.

Reagan v. Farmers Loan, &c., 154 U. S., 362.

St. Louis, &c. Ry. v. Gill, 156 U. S. 649.

In Ames v. Union Ry., 76 Federal Reporter, 176, the court says:

"The value of property cannot be destroyed by the legislature depriving the owner of adequate compensation. The power which the legislature has is only to prescribe reasonable rates *not any rates.* It is obvious, said another judge, that it must be held that the right of judicial interference exists only when the schedule of rates established shall fail to secure the owners of the property some income or compensation for their investment, or else, the court must when properly called on to do so, adjudge whether the rates established by the municipal authorities are so manifestly unreasonable as to amount to a taking of property for a public use without just compensation.

In Smith v. Ames, 169 U. S., 525, this court says:

"In this case it appears by the testimony of a witness, whose general fairness and competency to speak of the facts were unquestioned, that the average reduction made by the statute on all the commodities at local rates was 29½ per cent."

It further appeared in the case cited that if the reduction made was enforced the road would be obliged to operate at a loss. On that state of case this court held the statute was void. It is unnecessary to multiply authorities on a question so well settled, not only by the decisions of this court, but by the decisions of courts of last resort in all the states, so far as we have examined them. We believe it is entirely accurate to say that the uniform rule established both by federal and state courts is,

that legislation which does not provide a fair and reasonable return on the investment is obnoxious to the constitution of the United States.

In determining whether rates are adequate or inadequate courts will form an intelligent judgment from the proof presented and will not rely upon mere conjectures.

The courts after considering the evidence produced will reach their own conclusions regardless of what may have gone before. They will give to the facts the weight to which they are entitled, and on the facts determine whether or not the rates prescribed are reasonable or unreasonable. If they are unreasonable, or if they deny the individual or the corporation a reasonable or a fair return upon the investment the ordinance or the act of the legislature will be held void.

A municipal council, no matter how broadly it may have been invested with power to fix rates will be held to fix reasonable rates. It cannot act beyond such delgated powers, for ex necessitate, such action is invalid, because it is not within the scope of the power delegated.

All the court has to determine in this case on the branch of it now under consideration, if it reaches the facts, is as to the reasonableness of the rates and as to whether or not if the ordinance is enforced a reasonable return can be had on the investment.

In San Diego Land and Town Co., v. National City, 174 U. S. 64, this court says:

> "The contention of the complainant in the present case is that in ascertaining what are just rates, the court should take into consideration the cost of its plant; the

cost per annum of operating the plant, including interest paid on money borrowed, any reasonable expense necessary to the used in constructing the same, the annual depreciation of the plant from natural causes resulting from its use and a fair profit to the company over and above such charges for its services in supplying water to consumers, either by way of interest on the money it has expended for the public use or upon some other fair and equitable basis should be considered. Undoubtedly all these matters ought to be taken into consideration and such weight given them when rates are being fixed, as under all the circumstances would be just to the company and to the public.

The basis of calculation suggested by appellant is, however, defective, in not requiring the real value of the property and not the fair value of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The fair value of appellee's plant being $250,000, a fair income would be $15,000. The proof shows it makes nothing."

An ordinance which deprives a corporation or an individual engaged in the business of furnishing water a just compensation is repugnant to the federal constitution.

Since we have seen the ordinance in question would, if enforced, deprive appellee of a just or any compensation it is in violation of the constitution of the United States, and whether the city did or did not, have the right to fix water rates at the time

it passed the ordinance in March, 1900, the enforcement of that ordinance ought to be enjoined on the facts as they appear in the record.

The following cases are relied on to sustain this position :

Smyth v. Ames, 169 U. S. 446;

R. R. Commission Cases, 119 U. S. 307 ;

Dow v. Beedleman, 125 U. S. 680 ;

George R. & Banking Co., v. Smith, 125 U. S.;

St. Louis & San Francisco Co., v. Gill, 166 U. S. 649 ;

Covington & Lexington Turnpike Road v. Sanford, 168 U. S.

APPELLANT'S BRIEF.

We have just been furnished a copy of appellant's brief. The arguments therein have already been responded to, except the following propositions, to which we invite the court's attention :

First. It is contended by appellant not only in its brief but in its answer, that the City of Owensboro under its present charter had the power to pass the ordinance complained of.

Second. In its brief, at page 30, appellant says :

> " If it did not have such power the case ought to be dismissed, because no federal question is presented."

Hamilton Gas Light Company v. Hamilton City, 146 U. S. 265, is cited in support of this suggestion. But appellant does not urge this point, presumably because if this court should hold

there is no federal question involved, that would in substance and in fact be to hold that the City of Owensboro did not have, under its present charter any power to pass the ordinance of March 19, 1900, which is precisely one of the points appellee is insisting upon.

We have seen the city is contending it has such power and if this court concludes there is no federal question it will do so on the single ground that the city charter of Owensboro does not confer on it the authority to pass the ordinance in question.

Such ruling would sustain one of the contentions of appellee, because, it is urged in the bill that the City of Owensboro no matter what power it has under its present charter, had previously contracted with it that it should fix water rates to private consumers during its entire corporate existence.

Whatever view the court may take of section 3290, sub-section 5, of appellant's charter, it appears to be reasonably plain that it can fix water rates in only one of the two following states of case :

1. It may erect works of its own for supplying water to itself and inhabitants, in case it erects its own works, it could of course prescribe rates to be charged private consumers.

2. It may, in the absence of works of it own, supply itself and its inhabitants with water by contract, and in that case where it has acquired the right by contract, it may prescribe the rates to be charged to private consumers.

But the city has not exercised the power conferred on it by erecting works of its own, nor has it acquired the right by any contract to supply its inhabitants with water.

Danville Water Company v. City of Danville, 180 U. S. 578.

This case is cited by appellant as having some possible bearing on the issues involved. But an examination of the Danville Water Company case and the case of the Freeport Water Company v. City of Freeport, 180 U. S. 619, which involved the same question, will show that those cases have no application to the case at the bar.

The court's attention is directed to the opinions delivered in those cases and it is believed an examination of them will show how widely different the question involved there is from the questions involved in this case.

But if Your Honors hold that appellant, under its present charter had the power to pass the ordinance in question, then appellee appeals to the doctrine announced by this court in the case of Los Angeles v. Los Angeles City Water Co., 177 U. S. 559, wherein this court says:

> "The contention is that if the contract of 1868 is valid and the ordinance of 1897 reduces the income of the company below that which it should receive, the ordinance is void on its face, as being in conflict with the federal constitution and is no cloud on complainant's title.
>
> It is hence deduced that the water company has adequate legal remedies, and cannot resort to an equitable one. We concur with the learned trial judge that the ordinance is not void on its face. As said by him, 'in the case at bar, however the ordinance upon its face is valid, and its invalidity appears only when considered in connection with the contract of July 22, 1868, and evidence showing what the wates rates were

at that date.' While the court takes judicial notice of the ratifying act of April 2, 1870, still, since the provisions of the contract of July 22, 1868, are not embodied in said act, I am not sure that the said provisions are matters of judicial knowledge, although such seems to be the ruling of the court (one of the justices dissenting) in Brady v. Paige, 59 Cal. 52. Conceding however, that the court will take judicial notice of all the provisions of said contract still the one in question simply provides that the water rates shall not be reduced below the rates then charged without indicating what those rates were, and therefore the invalidity of the ordinance appears, not upon its face, but only in connection with extraneous evidence of what the rates were in July, 1868, and for this reason complainants have adduced that evidence in the present case."

And further:

"The complainants must either submit to the terms of the ordinance or incur unusually onerous expenditures. It is reasonably certain that if the ordinance is to stand, and they were to undertake the collection of rates in excess of those prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance succeed in collecting without an action, a higher rate than the ordinance prescribes, it is equally certain that they would thereby bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of

works. Surely these injuries are irreparable and actions at law, so far from being adequate to the exigencies of the situation, are, as complainants in their brief forcibly put it, mockeries of a remedy."

The Los Angeles case holds no matter how broad the power of appellant under its charter may be with respect to fixing rates to be charged private consumers, if the city had contracted that right away prior to the adoption of its present charter, then the ordinance is void. In order to ascertain whether the ordinance is or is not valid, an appeal must be made to extraneous evidence, namely the previous contracts between appellant and appellee and its predecessor. In such case this court holds that a federal question is presented regardless of the powers which may or may not be vested in appellant under its present charter.

An affimance of the judgment of the lower court both on the law and facts is respectfully asked.

WILLIAM T. ELLIS,
Attorney for Appellee.

SWEENEY, ELLIS & SWEENEY,

BINGHAM & DAVIES,
Of Counsel

NO. 18546.

Supreme Court of the United States

OCTOBER TERM, 1903, NO. 58.

CITY OF OWENSBORO, ... Appellant,

vs.

OWENSBORO WATER WORKS COMPANY, OF OWENSBORO, KENTUCKY, ... , Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

May it please Your Honors:

Having just seen the brief of counsel for the city, we beg leave of the court to have our supplemental brief considered. We shall attempt to combat several arguments by opposing counsel, and shall submit a brief summary of our own contentions.

I.

It is contended in several places in the brief of opposing counsel, in a vague way, that the rights, powers, privileges and franchises of the old *Owensboro Water Company* could not pass, and did not pass, by transfer and conveyance to the new *Owensboro Water Works Company.* Opposing counsel claims that this transfer of franchise rights could not take place because of the lack of power in the old company to transfer its corporate franchises to the new company. He contends that even the ratification, by the ordinance of the city, could not make a void transfer a valid one. We can not see what this contention has to do with the case at bar. The point was not raised in the court below;

it was not in issue there, and it has not been placed in issue by counsel in this court. The point appears in the brief of opposing counsel and does not appear in other and proper form in the records of the case. Opposing counsel seeks to use this point to show that some of the most important contractual privileges did not pass from the old company to the new company, which privileges and rights the present company relies upon in making its own rules and regulations and fixing its own rates. It will be remembered that in 1878 the *Owensboro Water Company* was incorporated, and, by the ordinance of that year, was given franchise rights in the city of Owensboro, and, among other franchise rights, it was given the power, by the ordinance of the city, *to make its own rules and regulations for furnishing a supply of water to the inhabitants of the city.* This right, as well as all the other rights, was given by the ordinance of 1878 to said old company and its assigns and successors. In 1889, the *Owensboro Water Works Company* was incorporated and received a transfer and assignment of the rights, powers and franchises of the *Owensboro Water Company* in the city of Owensboro. In the same year (1889) the city of Owensboro passed and adopted an ordinance recognizing, ratifying and authorizing the transfer of the rights, powers and franchises by the old *Owensboro Water Company* to the new *Owensboro Water Works Company.* This was fourteen years ago. It will be remembered that, among the powers, rights and franchises granted to the old company, and transferred by the old company to the new company, was the contractual right to make its own rules and regulations for supplying water, and the wording of the franchise upon this subject, in the ordinance of 1878, was as follows:

> "Sec. 9. The said company shall have the power and authority to make and enforce, as part of the

condition upon which it will supply water to its customers, all needful rules and regulations not inconsistent with the law or the provisions of this ordinance.

"Sec. 10. The said city will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises and against fraud and imposition, and against injury to the hydrants rented by it to the said city, and against waste of water by consumers."

Now, then, opposing counsel claims that, on account of the voidness of the transfer by the old company of its franchise rights to the new company, this contractual right does not pass to the present company. He contends for this in the face of the fact that by solemn ordinance passed and adopted in 1889, the city ratified and accepted the transfer of the complete franchise, and all of its rights and powers, from the old company to the new, and has since that time acquiesced in such transfer. We do not forget that opposing counsel has not raised this question properly and that it appears for the first time in his brief. The old *Owensboro Water Company* was incorporated under the law contained in chapter 56 of the General Statutes of Kentucky, then in force. The transfer was made in 1889 by the old company to the new company with this chapter 56 of the General Statutes of Kentucky still in full force and effect. The first section of this statute of Kentucky provides:

"Any number of persons may associate themselves together and become incorporated for the transaction of any legal business, except banking and insurance, and for the construction of railroads; but such incorporation shall confer no powers or privileges not possessed by natural persons, except as hereinafter provided."

Subsection 6 conferred the following power upon cor-

porations, except banking, insurance and railroad corporations:

> "To make contracts, to acquire and transfer property possessing the same powers in such respects as private individuals now enjoy."

Section 17 provides:

> "Persons acting as a corporation under the provisions of this act should be presumed to be legally organized until the contrary is shown and no such franchise shall be declared actually null or forfeited, except in a regular proceeding brought for that purpose."

Section 18 provided that no person sued for injury to the property of such corporations, or for wrong done to such corporations, should be permitted to rely upon a want of legal organization upon the part of such corporations.

The force of this Kentucky statute was that it made all corporations, except banking, insurance and railroad corporations, able to *contract* and *acquire property by transfer just as individuals could do*, and it put into possession of such corporations the same powers, with respect to contracts and transfers of property, as were enjoyed by individuals. This is clearly provided for in subsection 6 above quoted. This Kentucky statute created the presumption of the legal organization of the company owning a franchise, and declared that such franchise should not be forfeited, or considered null, until after successful proceedings had been instituted and closed in the regular way for forfeiting and nullifying such franchise. This is provided for in section 17 of the said statute. The ordinance of 1889 which conveyed to the *Owensboro Water Works Company* the franchise of the *Owensboro Water Company*, created a resulting

franchise in favor of the new company. *That franchise has never been broken or nullified by any proceedings of a regular nature, and the present company has operated under it for fourteen years.* Now, for the first time, in his brief, opposing counsel says that the franchise right of the old company to make its own rules and regulations for furnishing a supply of water did not pass by transfer from the old company to the new company, or by the ratification-ordinance with respect to such transfer in 1889. Upon the face of the written franchise of the old company that contractual right existed, and upon the face of the transfer by the old company to the new company, and upon the face of the ratifying and enabling ordinance of 1889 that franchise and contractual right existed, and it passes from the old company to the new company as a contract and a franchise right. The said chapter 56 of the General Statutes of Kentucky provides plainly that a franchise of a corporation shall not be declared null or forfeited, *except in a regular proceeding brought for that purpose.* No such regular proceeding has ever been brought to nullify or forfeit said franchise or any of its provisions or parts. The record in the case at bar does not show such a regular proceeding and it does not appear anywhere. Opposing counsel contents himself with vaguely claiming the voidness and nullity of one of the most important rights contained in the franchise of the present company by transfer from the old company and by ratification of the ordinance of 1889. As to what a regular proceeding for nullifying and forfeiting a franchise is we need not say, as it is too clear for argument that such a proceeding has not been entered into and does not appear in the record of this case. This statute of Kentucky, which was in force at the time of the creation of the old company, and at the time of the creation of the new company, and at the time of the

transfer by the old company to the new company and the ratification of such transfer by the ordinance of 1889, gave to both the old company and the new company the absolute right to make all contracts and to acquire and transfer all kinds of property just as a private individual could do, and gave to such companies all the powers in such respects as were enjoyed by private individuals. We quote again sub-section 6 which grants the powers:

> "To make contracts, to acquire and transfer property possessing the same powers in such respects as private individuals now enjoy."

It is useless to take time and space to further combat the vague argument in the brief of opposing counsel in regard to the nullity of the franchise rights enjoyed by the present company by transfer from the old company through the ratification ordinance of 1889. In support of our arguments, however, we cite the following cases:

> American Water Works Co. v. Farmers Loan & Trust Co., 73 Fed., 956.
>
> Austin v. Bartholomew, 107 Fed., 349.
>
> Carlisle v. Carlisle, W. L. & P. Co., 36 Ill. App., 28.
>
> Columbia W. & P. Co. v. Columbia, 5 S. C. N., 225.

II.

Counsel for the city, in his brief, relies on the cases of Freeport Water Co. v. Freeport and Danville Water Co. v. Danville in 180 U. S. These cases do not control the case at bar. They are cases arising under claims made by the city under an Illinois statute. The wording of that statute and the provisions of the Illinois Constitution in respect to the scope of that statute are consid-

ered and passed upon. The intervening judgment and decision of a State court also come into consideration in these cases as matters to be weighed in construing and in applying the Illinois statute. No such decision of a State court comes into the case at bar.

III.

A State is inherently, as a sovereign, vested with powers of regulating corporations, and fixing the rates charged by them for public services, because corporations are the creations of the State.

A municipality is a corporation itself and a creation of the State, and its powers of regulating corporations and fixing their rates are strictly confined to

(1) The municipal charter,

(2) The statutes and laws of the State, and

(3) The general police powers.

All the cases relied on by opposing counsel (Munn, Budd, San Diego, Ames, etc.) are cases where either

(1) The *State* has sought to fix rates,

(2) A city claims *charter or statute power* to do so,

(3) Or a city attempts to proceed under *police power.*

The city of Owensboro proceeds to attempt to enforce its ordinance under

(1) Its charter powers in sections 3290 and 3438, Kentucky Statutes, and under

(2) Its police powers.

The charter powers, in sections 3290 and 3438, Kentucky Statutes, are discussed in our original brief (pp. 8-19). The police powers are discussed in our original brief (pp. 19-24). The application of sections 3290 and 3438 is shown in Pikes Peak Power Co. v. City of Col. Springs, 105 Fed., 9, 10.

The police power is explained in Lake Shore, &c., R. Co. v. Smith, 173 U. S., 683.

IV.

If the right to regulate rates exists, and, for argument, let us grant that it does, it is settled that the regulation *must* allow the company to earn a *fair* and *reasonable* return on the investment, and the regulation must be *reasonable*. This is finally and definitely fixed by Cotting v. Godard, etc., 183 U. S., 79.

V.

Opposing counsel, in his brief (page 5), says that it is his contention that the company's gross income is $30,000 per annum. Of this, he says $7,400 is paid by the city. Then, he says, $22,600 is paid by private consumers. He claims that annual operating expenses amount to $6,000. Taxes, he says, are $2,500. Then, he claims that depreciation is $2,000 or $2,500. Then he admits that the reduction by the ordinance will amount to 30 per cent. Calculation shows that 30 per cent. of $22,600 (the part of the income to be affected by the ordinance) is $6,780. He says that this arrangement will yield 12 or 13 per cent. upon the value of the plant, which, he says, is $90,000 or $100,000. This brings counsel down to a statement that the company, under the ordinance, can earn about 12 or 13 per cent. He does not count as an expense or out-go to the company its *floating debt* (over $19,000) or the *interest* (6 per cent.) on that floating debt. He does not count in the *sinking fund*. He does not consider *bad debts*. He argues that interest on bonds can not be counted in as a legitimate expense, and he does not count that in accordingly. So, then, he leaves out *any* interest on *any* floating debt and *any* floating debt and *any* interest on bonds and *all* bad debts. Shall not *some* interest on *some* bonds and *some* interest on *some* floating debt be paid, and *some* pay-

ment be made on *some* sinking fund? The cases which consider the bonds and floating debt and sinking fund, etc., as proper or improper things to be considered in determining what basis shall exist for calculating what is reasonable in the way of rates, only hold this, and nothing more: THAT OVER-CAPITALIZATION AND OVER-BONDING CAN NOT BE CONSIDERED AS CONSTITUTING A BASIS FOR COMPUTING WHAT IS REASONABLE IN CHARGING RATES THAT WILL EARN A RETURN UPON THE INVESTMENT. This means that *some* bonds and *some* interest on bonds and *some* floating debt and *some* uncollectible debts due the company ought to be considered. Counsel leaves out of his calculation *all* interest and *all* bonds and *all* of the floating debt and *all* uncollectible debts. Let us put them and the uncollectible debts in and see what they produce when added to the admissions of counsel in his brief (page 5):

Admitted running expenses (real, $13,000)	$6,000 00
Admitted taxes (real, $2,500 to $5,000)	2,500 00
Admitted wear and tear (real, $9,000)	2,500 00
Interest (6 per cent.) on floating debt (say, $10,000)	600 00
Some annual payment to sinking fund (say) ...	2,000 00
Some payment of 5 per cent. interest on some bonds (say, $50,000)	2,500 00
Some cancellation of floating debt	2,000 00
Some loss in bad debts, 10 per cent, (real, 20 per cent.)	3,100 00
	$21,200 00

See the result! Counsel admits, in his brief (page 5), that, under the ordinance the company's income (he terms it *net* income) would be $13,000 per annum. He will not, however, count the items of *some* interest on *some* float-

ing debt or *some* payment to the sinking fund or *some* payment of interest on *some* bonds (say as small an issue of bonds as $50,000) or *some* annual cancellation of the floating debt or *some* loss by bad debts. We repeat, that the cases everywhere only forbid OVER-CAPITALIZATION and OVER-BONDING as a basis of computing reasonable rates. Therefore, *some* capitalization and *some* bonds are allowable. In the above table we only calculate on, say, $50,000 of bonds, and on, say, a payment annually to the sinking fund of $2,000, and of a cancellation of, say, $2,000 of the floating debt each year. We reduce things to an absurdity.

We show by the above table that the total yearly outgo of the company, on a basis that is so reasonable that it is almost absurd, is *$21,200*. We show, however, in our original brief (page 44), by *undisputed evidence*, that the *real* outgo per annum is *$30,700*. We are arguing the matter under the admissions of opposing counsel in his brief (page 5). He says that the annual running expenses are *$6,000*. *He guesses at this!* The only evidence in the case that ought to be entertained on this matter is that of Mr. McGonigale, who testified that the annual operating expenses are *$13,000*. Mr. McGonigale is the secretary and treasurer of the company. He testified as to *actual existing facts* with the books of the company before him. Opposing counsel *guesses* at wear and tear as amounting to about $2,500. Mr. McGonigale says that the books of the company show this to be actually *$9,000* per annum. Opposing counsel places the annual taxes at *$2,500*, but Mr. McGonigale says that they *actually* range from *$2,500* to *$5,000*. Mr. McGonigale says that there is a yearly loss to the company of *$6,200* in uncollectible debts. Opposing counsel ignores this item. When we place it in the above table we cut it in two in order to make a concession for the sake of argu-

ment. It is an *actual fact* that there are over *$200,000* of bonds, but in the above table, for the sake of argument, we calculate interest on but *$50,000* of bonds. It is an *actual fact* that the floating debt of the company is over *$19,000*, but in the above table we show a cancellation of that debt by a payment of *$2,000* per annum upon it. Opposing counsel will not consider the floating debt or the interest on that debt or the sinking fund or the interest on the bonds, or the loss by bad and uncollectible debts. When we come to consider these things in our above table, we reduce them, for the sake of argument, to the smallest possible figure or estimate that will harmonize with anything like reason. We get the result of *$21,200* as the yearly outgo or expense of the company. Opposing counsel says that the *present* income of the company is *$30,000* a year (brief, page 5). He says that the ordinance will reduce the part of this income which comes from the private consumers *($22,600)* by *30 per cent.* Calculation shows that *30 per cent.* of *$22,600* is *$6,780.* Subtract *$6,780* from *$22,600* and the result is *$15,820*, which is the amount received from private consumers when the ordinance is in force, according to the arguments of opposing counsel. If we add *$15,820* to the amount received from the city for fire protection *($7,400)*, we get the gross income of the company under the ordinance, according to arguments of counsel, which is *$23,220.* We have shown above that, by the most absurd concessions, the total outgo of the company is *$21,200.* We see that, under the ordinance, its income will be only *$23,200.* This leaves as a net profit only *$2,020*, which is about *2 per cent.* upon the *admitted* value of the plant.

Of course this line of reasoning is based entirely on statements and figures set by brief of opposing counsel, to which our added items of expense, which ought reasonably to be taken into consideration, are attached. THE

GIST OF THE WHOLE MATTER IS, THAT OPPOSING COUNSEL HAS RECKONED WITHOUT HIS HOST, IN ATTEMPTING TO GUESS AT THE YEARLY EXPENSE OF THE COMPANY, AND HE HAS LEFT OUT MANY THINGS WHICH GO TO MAKE UP THE LEGITIMATE EXPENSES OF THE COMPANY. WHEN THE RECKONING IS PROPERLY TAKEN, AND ALL THINGS ARE PROPERLY INCLUDED, THE EXPENSES OF THE COMPANY, BY THE ADMISSIONS IN COUNSEL'S BRIEF, NEARLY EQUAL ITS INCOME. WHEN WE TAKE INTO CONSIDERATION THE EVIDENCE OF MR. M'GONIGALE AND THE FACTS, AS SHOWN BY THE BOOKS OF THE COMPANY, FREE FROM ANY GUESSWORK, THE EXPENSES OF THE COMPANY MORE THAN EXCEED ITS INCOME.

Respectfully submitted,

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W. W. DAVIES,
ROBERT W. BINGHAM,
Of Counsel.

Supreme Court of the United States.

No. 58.—October Term, 1903.

The City of Owensboro, Appellant, vs. The Owensboro Waterworks Company. } Appeal from the Circuit Court of the United States for the Western District of Kentucky.

[November 30, 1903.]

This is a bill in equity to enjoin the city of Owensboro, Kentucky, from regulating the rates of the appellee, the Owensboro Waterworks Company. Lawson Reno, police judge of the city, was made a party. The Circuit Court granted a temporary injunction. Before final hearing, a motion was made before Circuit Judge Lurton to dissolve the injunction, the motion was denied on the ground of the seriousness of the questions involved, and the propriety of following the previous ruling. On final hearing, the injunction was made perpetual against the city, and the bill dismissed as to Lawson Reno. The city then took an appeal to Circuit Court of Appeals. The appeal was dismissed on the ground that the jurisdiction of the Circuit Court having been invoked on a constitutional question, the appeal should have been taken directly to this court. (115 Fed. Rep. 318.) The city then brought the case here from the Circuit Court.

The city asserts the right to regulate the rates of the appellee under a statute of the State. The construction of the statute is contested by the appellee. The appellee urges, besides, that the statute so interpreted violates its contract with the city, and that the rates as fixed deprives it (the appellee) of its property without due process of law. These contentions make the issues between the parties. The bill is voluminous. The allegations with which we are concerned are the following: The appellant was created a city by the general assembly of Kentucky in 1866. Its charter was amended in 1882, and it continued under this charter until June, 1893, when it was made a city of the third class under the general laws of the State. These laws provided that "the repeal of any law by the provisions of this law (the charter) shall not in anywise be so construed as to affect any right or liability acquired or assumed thereunder by or on the part of the city, or any persons or body corporate. This law shall not in any manner affect any right, lien or liability accrued, established or subsisting under and by virtue of previous charters or amendments thereto, or ordinances passed thereunder. But such rights, lien or liability shall be enforced, and such action or proceedings shall be carried on in all respects as if this law (defendant's city's present charter) had not taken effect; nor shall this law be in anywise so construed as to affect the right or liability acquired or assumed under previous charters or amendments

thereto, or ordinances passed thereunder on the part of the city or any person or body corporate."

The Owensboro Water Company was incorporated in 1876, and its general business was to construct and operate a waterworks plant for the purpose of supplying the city and its inhabitants with water, and it constructed and operated such works under the privilege and authority of an ordinance of the city, passed September 10, 1889. The ordinance had the usual provision for the use of the streets, and made the duration of the grant identical with the duration of the company. It was provided that the ordinance should be binding upon the city "as a contract in the event" of its written acceptance within ten days after its passage, and "be the measure of the rights and liabilities of the said city and of the water company."

Section 9 of the ordinance was as follows:

"SEC. 9. The said company shall have the power and authority to make and enforce, as part of the condition upon which it will supply water to its consumers, all needful rules and regulations, not inconsistent with the law or provisions of this ordinance."

In June, 1889, the appellee began negotiations with the Owensboro Water Company for the purchase of its franchise and plant, and of all of its contracts with the city, but did not and would not consummate said purchase until the city agreed to grant it (appellee) a franchise and license to maintain a system of waterworks in the city for a period of twenty-five years, and issue and grant to it in its own right all of the rights and privileges which had theretofore been granted to the water company by the ordinance and contracts of September 10, 1878. On the 3d of June, 1889, the city passed an ordinance approving such purchase, and granted a franchise and license to the appellee to maintain and operate a waterworks plant for supplying the city and its inhabitants with water, and accepted the appellee as the successor of the water company to the contracts between the latter and the city. The ordinance was expressed to be in consideration "of the purchase, by the Owensboro Waterworks Company of Owensboro, Kentucky, of the waterworks of the Owensboro Water Company."

On the 10th of June, 1889, relying upon the ordinance of the 3d, the appellee consummated the purchase from the water company of its works, franchises and contracts, and received them from that company, and it "has ever since then under the orders and directions" of the city, maintained and extended its system, on account of which it has expended large sums of money, and its plant is now reasonably worth not less than $250,000, and could not be constructed for less than that sum.

On the 19th of March, 1900, the city passed an ordinance providing "that hereafter every person, firm, company and corporation, engaged in the business of furnishing water to consumers thereof in the city of Owens-

boro, shall furnish the same to consumers thereof for domestic and manufacturing purposes and uses, and for all other purposes and uses, at rates and prices not exceeding the rates and prices herein named fixed, which rates and prices are deemed reasonable and just; that is to say, water shall be furnished to all mills, laundries, saloons, distilleries, breweries, livery stables, ice factories and manufacturing establishments, hotels, street railway companies and all factories of every kind at the following named rates."

Then followed a statement of the rates fixed, graduated according to the amount of water consumed or kind or purpose of use. And it was provided, (sec. 8), "that if any person, firm, company or corporation engaged in the business of furnishing water to consumers thereof in said city of Owensboro shall demand, charge, exact or receive, directly or indirectly, of or from any consumer or consumers of water in said city, as consideration or compensation for water furnished or supplied to such consumer, any money, property or other thing of value over and above or in excess of the rates and prices for water herein named and prescribed, or shall fail or refuse for ten days, without reasonable excuse, to supply water as prescribed and required in and by section seven (7) of this ordinance; or shall fail or refuse to keep the accounts or the books required to be kept at Owensboro, or make the reports in writing to the common council, as required by section sixth (6th) of this ordinance, such person, firm, company or corporation so offending shall be fined, upon conviction, in a sum not less than ten and not exceeding fifty dollars for each offense."

The ordinance in full is inserted in the margin.*

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* An ordinance to fix and regulate rates, prices and charges for water furnished consumers in the city of Owensboro, and for other purposes.

Be it ordained by the common council of the city of Owensboro:

SEC. 1. That hereafter every person, firm, company and corporation engaged in the business of furnishing water to consumers thereof in the city of Owensboro, shall furnish the same to such consumers thereof for domestic and manufacturing purposes and uses, and for all other purposes and uses, at rates and prices not exceeding the rates and prices herein named and fixed, which rates and prices are deemed reasonable and just; that is to say, water shall be furnished to all mills, laundries, saloons, distilleries, breweries, livery stables, ice factories, hotels, street railway companies, and all factories and manufacturing establishments of every kind, at the following-named rates, subject to the exceptions contained in section two (2) of this ordinance, to wit:

(1) In all cases where the amount of water consumed averages two thousand gallons per day, or less, estimated by the month, ten cents per thousand gallons; (2) where the daily consumption of water averages two thousand gallons, or more, and less than four thousand gallons, estimated by the month, nine cents per thousand gallons; (3) where the daily consumption of water averages four thousand gallons, or more, and less than ten thousand gallons, estimated by the month, eight cents per thousand gallons; (4) where the daily consumption of water

It is alleged that the enforcement of the ordinance will cause appellee irreparable injury and in what manner that will be done is detailed, and that, appellee "could not under the most prudent management, earn any per cent upon its investment, but would be compelled to operate its plant at an actual loss."

For the reasons alleged the ordinance of March 19 violates the constitution of the State of Kentucky and the Fifth and Fourteenth Amendments of the Constitution of the United States. It is also alleged, with much amplification, that the passage of the ordinance was "*ex parte* and partisan," without deliberation or investigation or knowledge, and, besides, the city had no power to pass the ordinance, and that the latter violates the contract existing between appellee and the city. It is also alleged that financial injury will result to appellee from the enforcement of the ordinance in regard to meters (sec. 2,) and from the prohibition to collect rates in advance, "except by voluntary consent of the consumer." (Sec. 3.)

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averages ten thousand gallons, or more, and less than fifteen thousand gallons, estimated by the month, seven cents per thousand gallons; (5) where the daily consumption of water averages fifteen thousand gallons, or more, and less than twenty-five thousand gallons, estimated by the month, five cents per thousand gallons; (6) where the daily consumption of water averages twenty-five thousand gallons, or more, and less than forty thousand gallons, estimated by the month, four cents per thousand gallons; (7) where the daily consumption of water averages forty thousand gallons, or more, estimated by the month, three and one-half cents per thousand gallons.

That for the purpose of ascertaining and estimating accurately the quantity of water consumed by consumers in the classification of this section and the compensation to be paid therefor, it is hereby made the duty of the persons, firms, companies and corporations, and they shall, on request made in writing, and within thirty days after such request is made, place a water meter, in good condition and repair, in connection with the pipe or main leading into and supplying water to such consumers, and the said meter shall be kept in good repair by the person, firms, company and corporation furnishing or supplying the water to such consumers, and the said meters shall be examined and read monthly, for the purpose of ascertaining its condition and the quantity of water consumed.

Provided, that the minimum annual rate to be paid by all consumers of water described in the classifications thereof in this section, per annum, shall be twenty-four (24) dollars; and in no case shall the consumer of water who uses or consumes, annually, two hundred and forty thousand gallons of water, or less, be charged or pay more or less than twenty-four (24) dollars per annum.

SEC. 2. That water furnished by said persons, firms, companies and corporations to consumers thereof for domestic purposes and uses where no meter has been put in or attached for ascertaining the quantity of water used, shall be furnished at rates and charges not exceeding or above the following-named rates and charges, per year, to wit:

(1) For each wash stand, wherein warm and cold water, or either, is used, two dollars; (2) for each kitchen sink, wherein warm and cold water, or either, is used,

Prosecutions are threatened under the ordinance which will result, it is alleged, in irreparable injury to appellee, and an injunction is hence prayed against the city.

A demurrer to the bill was overruled. An answer was then filed, which denied the allegations of the bill and justified the action of the city.

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

By the act of the general assembly of Kentucky, approved June 14, 1893, the appellant was made a city of the third class, and was given, as a city of that class, the following powers expressed in section 3290: "The common council of said city shall, within the limitations of the constitution of the State and this act, have power by ordinance; . . . 5th, to provide the city and the inhabitants thereof with water, light, power, heat and telephone service by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the prices to consumers and customers."

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two dollars; (3) for each bath tub, wherein warm and cold water, or either, is used, two dollars; (4) for each water closet and urinal, two dollars; for sprinkling premises, lawn, pavement and street in front of or adjacent to the premises, per annum, two dollars and fifty cents for the first two hundred square yards or less, one cent for each additional square yard; (6) for private dwelling per annum where only one tap or faucet is used, containing four rooms or less, excluding hallways, garrets, bath rooms, water closets, two dollars, and for each additional room fifty cents; (7) for each cow, one dollar, for each horse, one dollar; and for each carriage, buggy and spring wagon, one dollar; (8) for filling cisterns, twenty cents each thousand gallons.

Sub. Sec. 2. And for furnishing water for offices, banks, stores and other places than residences (above specified in this section), the rates and charges therefor shall be at rates not exceeding or above the following rates and charges, per year, to wit:

For each wash stand, wherein warm and cold water, or either, is used, three dollars; (2) for each water closet and urinal, three dollars; (3) for hydrant, three dollars; (4) for barber shops, for first chair, three dollars, for each additional chair, one dollar; (5) for blacksmiths, for first forge, two dollars, and for each additional forge, one dollar; (6) for plasterers, one-fourth of one cent per square yard; (7) for bricklayers, six cents per one thousand brick, sprinkling and laying.

Provided, that any of the consumers embraced in the classification of this section may, in lieu of the above rates, require the person, firm, company or corporation furnishing the water to the consumer, to attach to the pipe leading into the premises of the consumer, a water meter, and it shall be the duty of the person, firm, company or corporation furnishing the water to attach the said meter within thirty days after said request is made therefor in writing, and thereafter the said consumer shall be charged, and shall pay for the water furnished at the minimum rate of twelve dollars per annum, and for all water consumed in excess of one

Under this section the city passed the ordinance which prescribe the rates and regulations complained of. The Circuit Court decided that the city was not given the power to pass the ordinance, and considered it unnecessary to pass on the other issues. The court said:

"If the city of Owensboro had no lawful power or authority to pass the ordinance at all, then the enforcement of it would clearly be a taking from the complainant of its right to certain property. First, without compensation; second, without due process of law; third, without giving to it the equal protection of the law.

"This makes it necessary to inquire whether the city had the statutory power and authority to pass the ordinance complained of. It does not seem to be needful to inquire whether the State constitution gives the general assembly power to delegate authority in the premises to the city. The initial proposition is, has the legislature done so in fact, whether it had the power or not? This must depend upon the proper interpretation and construction of section 3290 of the Kentucky Statutes, . . ."

Interpreting the section the court held that the word "thereof" in the last sentence of the section had for its antecedent the words "works of its own." Substituting these words for the word "thereof," the sentence

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hundred and twenty thousand gallons per annum there shall be paid ten cents for each thousand gallons; but such meters shall not be attached except by the written request of the consumer.

And, provided further, that before meters are attached to or connected with the pipes or mains leading into the premises of any consumer described in the classification of this section, by the person, firm, company or corporation supplying the water, consent of such consumer shall be first obtained, and if objection shall be made by the consumer, the mayor of the city, upon complaint by the person, firm, company or corporation furnishing the water, shall summon the consumer to appear before him, and shall hear and determine the matter, and decide whether the meter shall be attached, and his decision shall be final.

If said persons, firms, companies or corporations furnishing water shall attach a meter in any case to the pipe leading into any consumer's premises, without his consent, or against his objection, and the water annually consumed shall not be as much as one hundred and twenty gallons, the consumer shall pay for the water actually consumed at the rate of ten cents per thousand gallons, and no more.

SEC. 3. That water rates may be collected by said persons, firms, companies and corporations from all consumers falling within the provisions of sections one and two of this ordinance who have water meters attached, monthly, quarterly, or semi-annually, at the election of said persons, firms, companies or corporations furnishing the water, but water rates shall not be collected in advance except by voluntary consent of the consumer.

Water may be shut off from any consumer for non-payment of water rates, or other sufficient reason, only after ten days' written notice served upon said consumer or his wife, in his absence from home, or in case of absence from premises of both husband and wife, then the said notice shall be delivered by depositing same in the Owensboro post office addressed to said water consumer:

SEC. 4. That if any person, firm, company or corporation shall be or become a consumer of water, and shall not be included in the classification made and con-

would read, and the city's power would be, "to make regulations for the management *of its own works*, and to fix and regulate the prices to consumers and customers." But another ambiguity appears, viz., of what is the city to fix and regulate the prices? Certainly of something, and it would seem from the context, the same thing, of which it was to regulate the management. But this leads to an absurdity, and we must find a purpose (antecedent) to which both powers can refer. The city might, indeed, make regulations for the management of its works, but it could not fix and regulate the prices of them to consumers and customers. Besides, we cannot conceive that an explicit grant of power was necessary to enable the city to manage its own works. The power to construct would have implied the power to manage and operate. It must not be overlooked that the section was intended to apply to not only to the appellant city but to all cities of the third class, and confer power not only to provide water, but other services, and it might have seemed necessary by the legislature, or at any rate prudent, to reserve to the cities the power over the management of

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tained in the second section of this ordinance, the quantity of water used or consumed by such consumer shall be ascertained by meter and compensation made therefor at the rates and charges specified in the first section of this ordinance.

SEC. 5. That all persons, firms, companies or corporations furnishing water to consumers in the city of Owensboro, that shall have mains, pipes and conduits in the streets, alleys and public ways of the city, shall hereinafter, during the months of April, May, June, July, August, September, October, November in each year, cause all water mains of said persons, firms, companies and corporations to be washed and cleaned, and for this purpose shall cause all fire hydrants to be open to their full capacity and water discharged from each for at least five minutes once in every two weeks; and during the months of December, January, February and March shall, for said purpose, cause all fire hydrants to be open to their full capacity for at least five minutes once in each and every of said months last mentioned.

SEC. 6. That hereafter all persons, firms, companies and corporations engaged in the business of furnishing water to consumers shall keep an exact, complete and true account of all its incomes, gains and receipts from all and every source whatever, in detail, giving all the items thereof, and date of receipt of the same, and an exact, complete and true account of all expenditures, showing date and amount of each and every item of expense, costs and expenditure and the whole thereof; and the books containing said accounts shall be kept at Owensboro, and shall be open at any time to inspection and examination by the common council or a committee thereof appointed for that purpose, and shall make and return to the common council, at the end of each six months hereafter, on the first day of January and July of each year, a true and complete summary of the same, which shall be verified by the oath of the president, secretary or treasurer of said persons, firms, companies or corporations furnishing water, and the said report shall be spread on the journal and filed and preserved by the city clerk in his office.

SEC. 7. That it shall be the duty of any person, firm, company or corporation engaged in the business of furnishing water to consumers thereof, in the city of

works constructed by private persons, and as prudent to reserve a power to fix and regulate the prices to consumers of the services afforded. It is certainly not difficult to conceive the necessity of the exercise of those powers, and if attempted to be exercised without a reservation, the cities might be met (and there are examples of this) with the contention that the power had been bartered away and was precluded by the obligation of a contract. The construction urged by appellee must, therefore, be rejected. There is a more natural one. The purpose of section 3290 was to provide the inhabitants of cities of the third class with the services mentioned—water, light, power, heat and telephone. They could be provided by the cites directly or they could be provided by private persons; but whatever way provided, the power was given to regulate the management and fix the rates of the services, and this was but the endowment of a common governmental power.

It is, however, contended that the ordinance is in violation of the contracts between the city and appellee, constituted by the resolutions and ordinance of the 3d of June, 1889. The argument is that the city had entered into contracts with the Owensboro Water Company, the prede-

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Owensboro, through pipes, mains or conduits laid in the streets, alleys and ways of said city, to furnish water to all persons who may make application thereof in writing, and within ten days after the date fixed in such written application, and who desire the same furnished in houses or places situated on any of the streets, alleys or ways or places in the city, wherein any of the said mains, pipes or conduits are located or laid, and the said person, firm, company or corporation shall put down all necessary pipes therefor, at the expense of the person, firm company or corporation furnishing the water to the boundary line of the lot or premises of the applicant for water or consumer, and the remainder of the pipes, machinery or appliances necessary for conveying the water into the houses or upon the premises shall be borne by the said applicant or consumer of water.

SEC. 8. That if any person, firm, company or corporation engaged in the business of furnishing water to consumers thereof in said city of Owensboro shall demand, charge, exact, or receive, directly or indirectly, of or from any consumer or consumers of water in said city, as consideration or compensation for water furnished or supplied to such consumer, any money, property or other thing or value over and above, or in excess of the rates and prices for water herein named and prescribed; or shall fail or refuse for ten days, without reasonable excuse, to supply water as prescribed and required, in and by section seven (7) of this ordinance, or shall fail or refuse to keep the accounts, or the books required to be kept at Owensboro, or make the reports in writing to the common council, as required by section six (6) of this ordinance, such person, firm, company or corporation so offending shall be fined, upon conviction, in a sum not less than ten dollars and not exceeding fifty dollars, for each offense.

SEC. 9. This ordinance shall go into full force and effect on and after the first day of April, in the year of our Lord nineteen hundred.

Approved, March 21st, 1900.

cessor of appellee, to which contracts and their obligations and rights, it is contended, the appellee succeeded by assignment from the water company, with the consent and approval of the city as expressed in the resolutions and ordinance of June 3, 1889. To determine their legal effect, however, it will be necessary to consider the law which authorized them.

At the time of the passage of the ordinance granting the Owensboro Water Company the right to construct waterworks the city existed and was exercising its powers under the charter of 1878, and the provision in that for supplying water to the inhabitants of the city was as follows: "To make, establish and regulate wells, cisterns, reservoirs and pumps, and to provide for the furnishing of the city and the inhabitants thereof with water and gas."

The same provision was carried into the charter of 1882, and constituted the authority of the city when the ordinance and resolutions of June, 1889, were passed. It is contended that this provision gave the city no power to fix the rates. And counsel say: "In such case and in the absence of an express contract the individual or corporation furnishing water for domestic purposes may charge whatever seems right and reasonable."

But counsel go farther. They deny the right of the city to fix rates, and yet assert its power to enter into an irrevocable contract with the water company giving it such power, that is, giving it power to fix rates free from any regulation by the city, not only under any authority the city then possessed, but under any authority the city might be given by the legislature.

In this contention there are several elements, but we pass their consideration, and determine what contract, if any, the city entered into with the water company. Of course, it is implied in the grant to the company that it might charge some rates to consumers, but the question is, were those rates exempt from regulation by the city under any power it then had or might be given? An affirmative answer is contended for by the appellee under sections 9, 10 and 14 of the granting ordinance. Section 9 is the pivotal section. The others are complementary. By it the company was given "power and authority to make and enforce *as a part of the condition* (italics ours) upon which it will supply water to its consumers, *all needful rules and regulations,* (italics ours) not inconsistent with the law or provisions of this ordinance." The section is concerned with the rules between the company and consumers alone. The company may enforce all needful rules and regulations *as part of the condition* upon which it will supply water. What is the other part of the condition? It must be the payment of rates, but to that part of the condition the power to make regulations does not apply. It would ignore the distinctions made by the section and give besides the words "rules and regulations" too large a meaning to make them include the power of fixing rates to consumers. They have adequate and useful signification without that. There were many things in

the supply of water to consumers and in the orderly and prudent conduct of the business of the company which might need rules and regulations.

And even so construed, the power conferred is not without limitation. The rules and regulations must not be inconsistent "with the law," and this means not only as the law was when the ordinance was passed, but as the law might become. (*Ruggles* v. *Illinois*, 108 U. S. 527; *Railroad Commission cases*, 116 U. S. 307.) In the latter cases a grant of power to the railroad company was "to make and prescribe such by-laws, rules and regulations which the directors might deem needful and proper touching . . . all matters whatsoever which might pertain to the concern of the company." The company was also given the power "from time to time to fix, regulate and receive the toll and charges by them to be received for transportation of their railroad." From this grant of power it was claimed that the company had "the right of managing its own affairs and regulating its charges for the transportation of persons and property, free of all legislative control." Mr. Chief Justice Waite, speaking for the court, replied: "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power."

This doctrine has been affirmed numbers of times since. (*Freeport Water Company* v. *Freeport City*, 180 U. S. 587; *Rogers Park Water Co.* v. *Fergus*, Id. 624; *City of Joplin* v. *Southwestern Missouri Light Co.*, *ante*, p. .) And the same doctrine prevails in Kentucky. (*Winchester Turnpike Co.* v. *Croxton*, 98 Ky. 738.)

From these views it follows that if the city had no power under the charters of 1836 and 1882 to fix rates, and we only assume this, not decide it, such power was conferred by section 3290 of the act of June 14, 1893, and the city is not precluded from the exercise of that power by sections 9, 10 and 14 of the original ordinance granting the Owensboro Water Company the right to construct waterworks, nor by the ordinance of June 3, 1889, approving the transfer of the rights and contracts of that company to the Owensboro Water Works Company, the appellee herein. Nor is the city, by said ordinance, precluded from regulating the business of the appellee in the manner provided in the ordinance of March 9, 1900, which is the subject of the present controversy. It is true that it is contended that section 3 of the ordinance forbids the appellee from collecting rates in advance from all consumers. But the city does not contend for that construction. It claims only that the provision in regard to the collection of rates in advance apply only to consumers using meters, and even as to those consumers appellee can make reasonable regulations to secure the payment of rates. The ordinance is not absolutely clear, and we may resolve its ambiguities in

accordance with the concession of the city. It may be presumed that there was no intention to enact unreasonable and oppressive regulations.

Two other contentions remain to be considered—one made by appellant, and the other made by the appellee. It is difficult to assign a place or purpose in the discussion of the issues to that made by the appellant. The contention is that the Owensboro Water Company had no power to transfer its property and rights and franchises to the appellee. To what consequence is the contention directed? Surely the city wants an object for its regulation. The appellee is in possession of the waterworks, and is supplying the inhabitants of the city with water. It is that service which the city desires to regulate, and it is to "every person, firm, company and corporation" engaged in that service the ordinance of March 21, 1900, is addressed. No other person, firm or corporation than the appellee is so engaged in Owensboro, or has been so engaged for some years. We do not think that the legality of the ordinance can be questioned or measured by either the company or the city by the defects or perfections of the title of the company to its franchises or property. It may be, however, that it is not intended to press the contention so far, but to confine it to the denial of the exemption claimed by appellee as successor of the Owensboro Water Company. But, as we hold that the Owensboro Water Company had no such exemption, the contention becomes unimportant.

The other contention made by appellee is that the rates fixed by the city are unreasonable. Upon this contention we shall not pass. It depends upon many questions of fact and of values to which the Circuit Court gave no attention and on which it expressed no judgment. It is better for a trial court to determine such questions in the first instance. (*Chicago & Milwaukee Ry.* v. *Tompkins*, 176 U. S. 167, 179.)

Decree of the Circuit Court is reversed, and the case remanded for further proceedings in accordance with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.